90-871

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT AND GOVERNOR WILLIAM A. O'NEILL,
Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the provisions of 25 U.S.C. §§ 2701-2721 (Indian Gaming Regulatory Act) compel a sovereign State to permit commercial casino gambling when the criminal laws and public policy of the State prohibit such gambling, except for a limited statutory variation which permits bona fide charitable groups, under rigid State licensure, to raise funds by operating "Las Vegas Nights" at which imitation money is employed for wagering and merchandise only can be awarded as a prize?

2. Pursuant to the provisions of 25 U.S.C. §§ 2701-2721 (Indian Gaming Regulatory Act), must an Indian Tribe adopt an enabling Tribal Ordinance before the State has an obligation to negotiate a Compact governing Class III gambling activities on the Reservation?

PARTIES

All parties to this action are named in the caption. The petitioners are the State of Connecticut and its Governor, the Honorable William A. O'Neill. The respondent is a federally recognized Indian Tribe with reservation premises located within the geographic boundaries of Connecticut.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 913 F.2d 1024 (1989), and a copy is attached hereto at Appendix A-1. The opinion of the United States District Court for the District of Connecticut is reported in 737 F.Supp. 169 (1989), and a copy is attached hereto at Appendix A-2.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and U.S. Supreme Court Rule 10.1(c) because the lower courts have construed a new federal statute (Indian Gaming Regulatory Act) in a manner which vitiates the essential sovereignty of a State to decide, as a matter of public policy, whether a particular form of gambling is to be permitted within its borders. This Court has not yet had the opportunity to review the provisions of the Act which are of critical importance not only to the State of Connecticut but to any other State wherein is located the reservation of a federally recognized Indian Tribe.

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on September 4, 1990. This petition filed pursuant to 28 U.S.C. § 1254(1) is therefore timely.

STATUTES INVOLVED

25 U.S.C. §§ 2710(b)(1) and (2), in part, provide:

> (b)(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if —
>
> > (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
> >
> > (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction. . . .

25 U.S.C. §§ 2710(d)(1), (2), (3) and (7), in part, provide:

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —

(A) authorized by an ordinance or resolution that —

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(d)(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that —

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect. . . .

(d)(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact. . . .

(d)(7)(B)(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction

of such Indian tribe within the 60-day period provided in the order a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures —

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

Conn. Gen. Stat. § 7-186a(b), in part, provides:

(b) Any nonprofit organization, association or corporation may promote and operate games of chance to raise funds for the purposes of such organization, association or corporation, provided the sponsoring organization shall have been organized in good faith and actively functioning as a nonprofit organization in this state for a period of not less than two years prior to its application for a permit under the provisions of sections 7-186a to 7-186m, inclusive. . . . No person under the age of eighteen years shall promote, conduct, operate or work at events featuring, or play, such games nor shall any sponsoring organization permit any person under the age of eighteen to so promote, conduct, operate or play such games of chance. All funds derived from such games of chance shall be used exclusively for the purpose stated in the application of the sponsoring orgarization as provided in section 7-186b.

Conn. Gen. Stat. §§ 7-186c(a) and (c), in part, provide:

(a) . . . No more than four permits shall be issued to the same applicant in any twelve-month period and no permit shall be issued to the same applicant within two months from the issuance of a prior permit, except that a second permit may be issued within two months of the issuance of a permit for an event permitted pursuant to subsection (c) of section 7-186a. No game of chance shall be conducted at the same location more than twice within a period of three weeks.

(c) No individual bet or wager shall be made in money. No bet shall be made or accepted using any representation of money which exceeds twenty-five dollars. Only cash shall be used for the purchase of chips or any other representation of money to be used at an event and no credit or representation of credit shall be extended to players at such event. All chips or representations of money to be used at an event shall be counted prior to the event and at the termination of

such event with an accounting thereof certified to under penalty of false statement by the three persons designated in the permit application as being responsible for such games of chance. The three persons so designated shall be the only persons who shall sell or dispense chips or any other representation of money and shall be the only persons who shall redeem such chips or representations of money for prizes or merchandise or goods or for coupons or certificates for such merchandise or goods.

Conn. Gen. Stat. § 7-186d provides:

Any prizes to be awarded for the playing of such games shall be merchandise or goods. Cash prizes shall not be given nor shall any prize be redeemed or redeemable for cash. Coupons or certificates for goods may be issued by the sponsoring organization only. Such coupons or certificates shall contain a notation that such coupons or certificates may not be redeemed for cash money and that redemption of any such coupon or certificate for cash money by any person or organization shall constitute a class A misdemeanor. No person may be awarded a coupon or gift certificate which is redeemable at any business or mercantile establishment where such person is employed or affiliated. Any person or organization who redeems coupons or certificates evidencing a right to receive goods or merchandise issued by a Las Vegas night sponsoring organization for cash or consideration, other than goods or merchandise, shall be guilty of a class A misdemeanor.

Conn. Gen. Stat. § 7-186i, in part, provides:

Any sponsoring organization which holds, operates or conducts any games of chance, and its members who were in charge thereof, shall furnish to the executive director of the division of special revenue and to the chief of police of the municipality or to the first selectman, as the case may be,

a verified statement, showing (1) the amount of the gross receipts derived from each event of such games of chance, (2) each item of expense incurred or paid and each item of expenditure made or to be made and the name and address of each person to whom each such item has been or is to be paid, (3) the net profit derived from each event of such games of chance and the uses to which the net profit has been or is to be applied and (4) a list of prizes of a retail value of fifty dollars or more offered or given with the amount paid for each prize purchased or the retail value for each prize donated and the names and addresses of the persons to whom the prizes were given. . . .

Conn. Gen. Stat. § 7-186*l* provides:

Any person who knowingly violates any provisions of sections 7-186a to 7-186m, inclusive, except sections 7-186d or 7-186e, or who makes any false statement in an application for a permit or in any report required by the provisions of said sections, shall, for a first offense, be fined not more than five hundred dollars or imprisoned not more than ninety days or both and, for a second or subsequent offense, shall be fined not more than one thousand dollars or imprisoned not more than one year or both.

STATEMENT OF THE CASE

The respondent is a federally recognized Indian Tribe (hereinafter, Mashantuckets or Tribe) with a reservation located in Ledyard, Connecticut. Governor William A. O'Neill and Connecticut (hereinafter, State) are the petitioners. In October, 1988, Congress passed, and President Reagan signed, the Indian Gaming Regulatory Act (hereinafter, IGRA), 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168.

IGRA was designed by Congress to enable Indian Tribes to operate gambling enterprises upon reservations "as a

means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The Act, in recognition of the disparity that exists between different forms of gambling, established three categories of activities: Class I gaming, which consists primarily of traditional ceremonial games, the regulation of which is left entirely to the Tribe, 25 U.S.C. § 2710(a)(1); Class II gaming, which consists primarily of bingo and related games, the regulation of which is divided between the Tribe and a new federal agency, the Indian Gaming Regulatory Commission, created by IGRA, 25 U.S.C. §§ 2710(b) and (c); and Class III gaming, which consists of all other forms of gaming, the regulation of which is vested in the Tribe and the State with the allocation of responsibilities to be determined, after negotiations, in a document entitled a Tribal-State Compact. 25 U.S.C. § 2710(d). This case centers on Class III gaming in Connecticut, with a particular focus upon the issue of whether IGRA is to be interpreted as allowing a limited, minor statutory exception to literally consume the general proscription against casino gambling in this State.

Pursuant to IGRA, on March 30, 1989, counsel for the Mashantuckets, in a letter to Governor O'Neill, requested that the State enter into negotiations concerning a Compact "governing the conduct of expanded gaming activities on the Tribe's reservation . . . ." While the State does permit various forms of legalized gambling,[1] it became clear in discussions with the Tribe that its primary, if not exclusive, motivation was to construct and operate a casino upon its reservation. The State responded that since the operation of a casino in Connecticut was not permitted, it would not engage in negotiations designed to legitimatize such an endeavor. The State did offer to engage in "friendly litigation" with the Tribe to seek a resolution of whether casino gambling would be a permissible form of Class III gaming

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[1] State Operated Lottery, Conn. Gen. Stat. § 12-568; State Off-Track Betting, Conn. Gen. Stat. § 12-571; Pari-mutuel Wagering — Jai Alai and Greyhound Racing, Conn. Gen. Stat. § 12-575(a).

in Connecticut under IGRA. This offer was made at a time when the jurisdiction of the federal courts under IGRA did not exist since a mandatory 180-day waiting period of the statute (25 U.S.C. § 2710 (d)(7)(B)) had not expired. The Tribe never responded to this offer.

At the time of the initial request for negotiations, the Tribe had not adopted a tribal ordinance which would permit casino gambling upon the reservation. In fact, to date of this petition, the State has not been notified that such an enabling ordinance has been duly adopted by the Tribe.

On cross-motions for summary judgment, the District Court rendered judgment in favor of the Tribe finding that adoption of a tribal ordinance was not a precondition to negotiations and that casino gambling was a proper subject for negotiations under IGRA. It, therefore, ordered that the Tribe and State conclude a compact within sixty days.[2] On September 4, 1990, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

Pursuant to the order of the District Court (both the District Court and the Court of Appeals having denied the State's request for a stay), the State and Tribe have engaged in negotiations resulting in separate proposed compacts which have been submitted to a mediator, selected by agreement of the parties and appointed pursuant to the provisions of IGRA (25 U.S.C. § 2710(d)(7)(B)(iv)) by the District Court. The mediator, on October 22, 1990, has selected the draft compact submitted by the State. The State now has until December 22, 1990, to decide if it will accept the mediator's selection. Failing such an acceptance by the State, the Secretary of the Interior, in consultation with the Tribe, is

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[2] The District Court extended this deadline once and the parties by mutual agreement further extended this deadline so that the eventual date of October 1, 1990, was established as the date for submission of proposed compacts to the mediator.

authorized to promulgate "procedures" under which Class III gaming will be allowed to operate upon the reservation of the Tribe in Connecticut. 25 U.S.C. § 2710(d)(7)(B)(vii).

Obviously then, absent a favorable ruling from this Court, casino gambling will be initiated in Connecticut by the Tribe.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE INDIAN GAMING REGULATORY ACT HAS NOT BEEN DESIGNED TO FORCE A STATE TO PERMIT A FORM OF GAMBLING UPON A RESERVATION WHICH IS NOT A PERMISSIBLE ACTIVITY BY ANY PERSON OR ENTITY AT ANY OTHER LOCATION IN SUCH STATE.

IGRA clearly provides that a Class III gaming activity is lawful on an Indian reservation "only if" such an activity is "located in a State that permits such gaming for any purpose by any person, organization, or entity. . . ." 25 U.S.C. § 2710(d)(1)(B). It is undisputed that the operation of a commercial casino in Connecticut, by any person, would be a violation of the criminal law. *See*, Conn. Gen. Stat. §§ 53-278a through 53-278b.[3] Yet the Tribe argues, and the lower courts concur, that since Connecticut law sanctions the presentation of "Las Vegas Nights," such activity is sufficiently similar to casino gambling as to amount to "such gaming" as that phrase is employed in 25 U.S.C. § 2710(d)(1)(B), and that, therefore, the State must negotiate with the Tribe regarding the construction and operation of a casino on the reservation.

Even a brief look at the Connecticut statutes which permit "Las Vegas Night" activity is a convincing demonstration of the substantive disparity between Las Vegas night activity and a casino. Only a bona fide charitable organization may qualify for a Las Vegas night license, Conn. Gen. Stat. § 7-186a(b); such a license is valid for only the day or days specified in the permit and no more than four licenses

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[3] Conn. Gen. Stat. § 53-278a(3) defines professional gambling, punishable as a class A misdemeanor, as, *inter alia*: ". . . ; maintaining slot machines, . . . , roulette wheels, dice tables, . . . ; and the following shall be presumed to be included: conducting any banking game played with cards, dice or counters, or accepting any fixed share of the stakes therein; . . . .

will be issued to the same organization in any calendar year, Conn. Gen. Stat. § 7-186c(a); cash cannot be employed to place any wager, and cash cannot be awarded as a prize. Conn. Gen. Stat. § 7-186c(c).

Unquestionably, casino type games are conducted under a Las Vegas night permit (i.e., poker, blackjack, roulette, etc.) but imitation money must be employed and only merchandise can be awarded as a prize. Offering cash, or actually awarding it as a prize, is a criminal offense. Conn. Gen. Stat. § 7-186d. Moreover, the cash which is used initially to purchase the imitation money and the merchandise awarded as prizes must be strictly recorded and reported to the licensing agency of the State. Conn. Gen. Stat. § 7-186c(c). Yet the lower courts have found that this type of event, sponsored and run by a nonprofit group in a church basement on a Saturday night, and no-holds barred gambling in a casino like Trump Plaza in Atlantic City, are sufficiently similar so as to amount to "such gaming" as Congress has employed this phrase in IGRA. We submit that such a result is illogical, unintended by Congress, and evidences an utter disregard for the sovereignty of the State and its particular public policy.

Congress was not merely paying lip service to the notion of respect for a State's public policy when, in the "Findings" section of IGRA, it declared that gaming activity upon a reservation will be permissible if it is "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

While Connecticut has legalized some forms of gambling in order to generate much-needed revenue (*see* footnote 1, *infra* at p. 9), the Legislature has consistently refused, even in the face of specific proposals, to legalize casino gambling in this State. Connecticut General Assembly, Legislative Record Index (Final Edition, Regular Sessions, 1981, 1982). Moreover, since 1979, the Legislature, with the concurrence of the Governor, has pointedly and unequivocally determined that there shall be no expansion of legal gambling in this State.

Conn. Gen. Stat. §§ 12-571a, 571b and 574c. These legislative enactments have come to be known as the gambling "moratoria" statutes and have been renewed for two-year periods by every subsequent General Assembly session since 1979, the latest such action having been taken in 1989 (1989 Conn. Pub. Acts No. 89-282; 1989 Conn. Pub. Acts No. 89-290).

Even in the face of this unified Legislative and Gubernatorial declaration that Connecticut does not desire and will not tolerate casino gambling, the lower courts have interpreted IGRA in a manner that literally forces Connecticut to stand aside and witness the arrival of casino gambling. Such an unwelcome incursion, if it is to occur, should happen only because this Court has so ordained, and not simply based upon the decision of the Court of Appeals.

Moreover, the ruling below not only impacts and intrudes upon the sovereign authority of Connecticut, but shall have negative implications upon identical rights of other States. This is the first case, involving the provisions of IGRA and its interaction with State laws, to reach this Court. It will not be the last. Indeed, seven cases[4] have reached various

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[4] As of November 22, 1990, the following cases were filed and pending involving the issues arising under IGRA:

Cabazon Band of Mission Indians v. Deukmejian, et al. (U.S.D.C., E.D. Cal. Cause No. CIV-S-90-1118 MLS-GGH) (Issue: whether § 19596.6 of the Cal. Business and Professions Code is properly applied to the Cabazon Tribe's class III operations).

Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan (U.S.D.C., W.D. Mich. Cause No. 1:90 CV 611) (Issue: whether commercial casino gaming is a permissible form of class III activity in Michigan).

Lower Sioux Community of Minnesota v. State of Minnesota (U.S.D.C., 4th Div. Minn. Cause No. 4-89-936) (Issue: whether any form of class III gaming other than video games of chance are permissible topics of compact negotiations in Minnesota).

(continued)

stages of the litigation process in the District Courts which involve the gambling laws of six States and the effect which IGRA has upon the execution of those laws.

IGRA is a new federal enactment never before submitted for this Court's analysis. A persistent issue will center on whether IGRA may, in effect, nullify a State's criminal prohibition of gambling in its many and varied forms. Clearly, the decision of a State regarding gambling (ranging from a total Constitutional ban to full permissibility) is a core State determination, a matter which, the well-established principle of Federalism teaches, must be accorded respectful deference. This then is surely "an important question of federal law which has not been, but should be, settled by this Court, ..." U.S. Supreme Court Rule 10.1(c).

The Court of Appeals ruling below is further deserving of review because its decision: (a) centers on the application of a rigid rule of statutory construction regarding the repetitious use of the phrase "such gaming" to the exclusion of other pertinent statutory language which demands consideration; (b) misapplies this Court's holding in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), and/or

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[4] *(continued)*

Mississippi Band of Choctaw Indians v. State of Mississippi (U.S.D.C., S.D. Mississippi, Jackson Div. Cause No. J90-0386(B)) (Issue: whether the State of Mississippi has negotiated for a class III compact in good faith).

St. Regis Mohawk Tribe v. State of New York (U.S.D.C., S.D.N.Y. Cause No. 90 CIV 5513) (Issue: whether commercial casino gaming is a permissible form of class III activity on the St. Regis Mohawk Reservation in New York).

Lac Du Flambeau Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al. (U.S.D.C., W.D. Wis. Cause No. 90-C-0408-C) (Issue: scope of required negotiations for class III gaming compact in Wisconsin).

Oneida Tribe of Indians v. State of Wisconsin, et al. (U.S.D.C., W.D. Wis. Cause No. 89-C-916-C, appeal docketed No. 90-3337 (7th Cir. Oct. 17, 1990)) (Issue: whether the State of Wisconsin has negotiated in good faith concerning interpretation of IGRA).

employs the prohibitive/regulatory test of *Cabazon* in circumstances where Congress has not directed its use, and (c) ignores the only portion of IGRA's legislative history which specifically addresses the noncomparability of Las Vegas night activity and casino gambling.

The following statement of Senator McCain, made at the time of final passage of IGRA, reinforces the notion that Congress did not intend to inflict upon the States a gambling activity which is clearly anathema to the public policy of such a State:

> ". . . [W]e [the United States Senate] must ensure that the Indians are given a level playing field in order to install gaming operations that are the same as the States in which they reside and will not be prevented from doing so because of the self-interest of the States in which they reside. . . ."

134 Cong. Rec. S12653 (Daily ed., Sept. 15, 1988) (remarks of Sen. McCain).

If a statutory system such as Connecticut's, where charitable groups, under rigid regulation, are permitted to raise funds but only for their charitable purposes; where wagers are placed upon games of chance customarily associated with a gambling casino, but using imitation money only; where prizes may consist of merchandise only; and where the award of cash as a prize is strictly prohibited, amounting to a criminal offense if offered or received; if the existence of such a system is to be viewed as "such gaming" thereby permitting an Indian tribe to construct and operate a commercial casino enterprise, then what happened to "the level playing field"?

We submit that the consequence of such an interpretation results in an inverted playing field because a tribe would then be free to offer unlimited, high stakes casino gambling in a State where no other person or entity is permitted to offer or present such an activity.

Congress did not intend to deprive a state of its fundamental right to determine if a particular form of gambling

is to be permitted within its borders. Yet the decisions of the lower courts in this case result in just such a deprivation.

II. THE INDIAN GAMING REGULATORY ACT MANDATES THAT BEFORE A SOVEREIGN STATE MAY BE COMPELLED TO ENTER INTO NEGOTIATIONS, A TRIBE MUST FIRST ADOPT AN ENABLING TRIBAL ORDINANCE WHICH SIGNIFIES THAT THE MEMBERS OF THE TRIBE AGREE THAT A CLASS III GAMING ACTIVITY WILL BE SUFFERED UPON THE RESERVATION.

It is undisputed that the Tribe has not adopted a Tribal ordinance which would authorize the exhibition of casino gambling on its reservation.[5] Yet the provisions of IGRA relating to Class III gaming create a sequence of conditions which must be satisfied if the activity is to be "lawful" on the reservation. The first listed condition specifies that the activity (in this case, casino gambling) must be

> (A) authorized by an ordinance or resolution that —
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> (ii) meets the requirements of subsection (b), and
> (iii) is approved by the Chairman.

25 U.S.C. § 2710(d)(1).

The next conditions, listed in order by statute, are a determination of the permissibility of the activity in the State of location and conformity with a Tribal-State compact. 25 U.S.C. §§ 2710(d)(1)(B) & (C).

The State has consistently maintained that any obligation which it may have to honor a Tribe's request for negotiations regarding a compact (25 U.S.C. § 2710(d)(3)(A)) arises only after an ordinance is adopted and approved.

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[5] It is self-evident therefore that no such ordinance has been submitted to the Chairman of the Indian Gaming Commission for his requisite approval.

The Court of Appeals, finding nothing which "requires sequential satisfaction" of the listed requirements, has held that the adoption/approval of the ordinance is not a precondition to the State's obligation to negotiate. The analysis of the Court was faulty and is deserving of this Court's review because the decision: (a) fails to consider the importance Congress attached to the ordinance adoption/approval process which is demonstrated by the detailed and lengthy description of this process throughout the Act (*see, e.g.,* 25 U.S.C. §§ 2710(b), (d) & (e)); (b) neglects to recognize the importance this process occupies in the preservation and protection of the sovereignty bestowed upon the individual Indian tribes by Congress, *United States v. Wheeler,* 435 U.S. 313 (1978); and, (c) considers the provisions relating to a tribe's request for negotiations in isolation from the entire content and tone of the Act and without reference to relevant legislative history.

This decision also has repercussions beyond its impact upon Connecticut, for clearly other States shall be implicated. If the Court of Appeals' decision stands, then these States may be faced with the prospect that a Tribe, without first examining the issue of permitting gambling upon its tribal lands via the ordinance adoption vehicle, may demand and secure negotiations of the State. Thus, important, costly and essential State resources may be diverted to the negotiating task which culminates in a detailed, complex compendium called a Tribal-State Compact.[6] Under the reasoning of the Court of Appeals in this case, the foregoing process, with its attendant mass diversion of State resources, may end up being unnecessary and wasted, since only then must the Tribe decide, in its collective wisdom, if the activity is to be allowed by adopting, or rejecting, an enabling ordinance.

Thus, this issue is of fundamental legal significance since the jurisdiction of the District Court to order the State to begin and conclude negotiations with the Tribe regarding a Compact was founded entirely on the Court's view that adoption/approval of a Tribal ordinance was not a precondition to a valid request for negotiations.

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[6] The proposed compact submitted by the State to the mediator in this case (*see, infra* at p. 10) comprised a document in excess of 290 pages.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a Writ of Certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

Petitioners
State of Connecticut and
Governor William A. O'Neill

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1841—August Term, 1989

(Argued: July 18, 1990 Decided: September 4, 1990)

Docket No. 90-7508

MASHANTUCKET PEQUOT TRIBE,

Plaintiff-Appellee.

—v.—

STATE OF CONNECTICUT and WILLIAM A. O'NEILL, GOVERNOR OF THE STATE OF CONNECTICUT,

Defendants-Appellants.

Before:

WINTER, MAHONEY, and WALKER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Peter C. Dorsey, *Judge*, entered May 15, 1990, as modified on June 5, 1990, ordering appellants to enter into good faith nego-

tiations with appellee for the purpose of formulating a tribal-state compact governing the conduct of games of chance at appellee's reservation in Ledyard, Connecticut, and that such compact be concluded within sixty days.

Affirmed.

RICHARD M. SHERIDAN, Assistant Attorney General of the State of Connecticut, Hartford, Conn. (Clarine Nardi Riddle, Attorney General of the State of Connecticut, Robert F. Vacchelli, Carolyn Querijero, Assistant Attorneys General, Hartford, Conn., of counsel), *for Defendants-Appellants.*

BARRY A. MARGOLIN, Portland, Me. (Robert L. Gips, Gregory W. Sample, Tureen & Margolin, Portland, Me., Jackson T. King, Brown, Jacobson, Jewett & Laudone, Mystic, Conn., of counsel), *for Plaintiff-Appellee.*

Richard B. Stewart, Assistant Attorney General of the United States of America, Washington, D.C. (Carol J. Williams, Blake A. Watson, Attorneys, Department of Justice, Washington, D.C., Michael Cox, Department of the Interior, Washington, D.C., of counsel), *for the United States of America, Amicus Curiae.*

Robert K. Corbin, Attorney General of the State of Arizona, Phoenix, Ariz. (Ian A. Macpherson, Phoenix, Ariz., of counsel), *for the states of Arizona and Nevada, Amici Curiae.*

Donald J. Simon, Washington, D.C. (Sonosky, Chambers & Sachse, Washington, D.C., Jerome L. Levine, Neiman, Billet, Albala & Levine, Los Angeles, Cal., James E. Townsend, Minneapolis, Minn., of counsel), *for the National Indian Gaming Association, Amicus Curiae.*

MAHONEY, *Circuit Judge*:

The Indian Gaming Regulatory Act ("IGRA")[1] establishes three classes of gaming activity. The Mashantucket Pequot Tribe (the "Tribe") seeks to operate casino-type games of chance on its reservation located in Ledyard, Connecticut (the "Reservation"). The contemplated games are class III gaming activities, which are allowed only in conformance with a tribal-state compact. Accordingly, the Tribe requested that the State of Connecticut enter into negotiations with the Tribe concerning the formation of a compact. The state refused to negotiate, and when no compact had been completed more than 180 days after the request to negotiate, the Tribe filed this action against the State of Connecticut

1 The IGRA was enacted by Pub. L. No. 100-497, 102 Stat. 2467 (1988), and is codified at 25 U.S.C. §§ 2701-2721 (1988) and 18 U.S.C. §§ 1166-1168 (1988).

and Governor William A. O'Neill (collectively the "State") in the United States District Court for the District of Connecticut pursuant to 25 U.S.C. § 2710(d)(7) (1988). The Tribe sought (1) an order directing the State to conclude within sixty days a tribal-state compact with the Tribe governing the conduct of gaming activities on the Reservation, pursuant to section 2710(d)(7)(B)(iii), and appointing a mediator to resolve any impasse in accordance with section 2710(d)(7)(B)(iv); and (2) a declaratory judgment that the IGRA obliges the State to negotiate in good faith with the Tribe regarding the conduct of gaming activities on the Reservation.

Both sides moved for summary judgment. Agreeing with the Tribe that the only precondition to the State's obligation to negotiate is a request by the Tribe to negotiate in accordance with section 2710(d)(3)(A), the district court granted summary judgment to the Tribe directing the State to enter into good faith negotiations with the Tribe, and directing that the State and the Tribe conclude a tribal-state compact within sixty days.

We affirm.

Background

The IGRA declares its primary purpose to be the provision of "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). Its enactment followed court decisions upholding the right of tribes to conduct public bingo games on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Barona Group of Capitan Grande Band of Mission Indians v.*

Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 1020 (1982); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

The IGRA establishes three classes of gaming, which are subject to differing degrees of tribal, state, and federal jurisdiction and regulation. Class I gaming is limited to social games for nominal prizes and traditional tribal ceremonial games, § 2703(6), and is subject only to tribal regulation, § 2710(a)(1). Class II gaming includes bingo and related games, as well as certain nonbanking card games.[2] § 2703(7)(A). Banking card games, electronic games of chance, and slot machines are expressly excluded, § 2703(7)(B), but certain banking card games operated by Indian tribes in certain states on or before May 1, 1988 may be grandfathered as class II gaming, § 2703(7)(C). Class II gaming is generally not subject to state regulation,[3] but is subject to some fed-

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2 "The distinction is between those games where players play against each other rather than the house [(nonbanking card games, *e.g.*, poker)] and those games where players play against the house and the house acts as banker [(banking card games, *e.g.*, blackjack)]." S. Rep. No. 446, 100th Cong., 2nd Sess. 9, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3079 ("Senate Report").

3 Class II gaming may be conducted, however, only "within a State that permits such gaming for any purpose by any person, organization or entity," § 2710(b)(1)(A), and "[a] tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements . . . are at least as restrictive as [applicable] State law governing similar gaming," § 2710(b)(4)(A). In addition, nonbanking card games per-

eral oversight by the National Indian Gaming Commission ("NIGC"), § 2710(b) and (c), in addition to tribal regulation, § 2710(a)(2). All other forms of gaming are classified as class III gaming. § 2703(8).

Under section 2710(d)(1), class III gaming activities are lawful on Indian lands only if such activities are:

> (A) authorized by an ordinance or resolution that—
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> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
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> (ii) meets the requirements of subsection (b) of this section, and
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> (iii) is approved by the Chairman [of the NIGC],[4]
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> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
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> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) [of section 2710(d)] that is in effect.

25 U.S.C. § 2710(d)(1) (1988). A tribal-state compact is "in effect" when "notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register." § 2710(d)(3)(B).

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mitted as Class II gaming must be "played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games." § 2703(7)(A)(ii).

4 The first chairman of the NIGC was confirmed by the United States Senate on May 26, 1990.

In sum, class III gaming activities are subject to tribal and state regulation, as provided by a tribal ordinance, a tribal-state compact, and the IGRA.

The Tribe sought to expand its gaming activities to include class III games of chance, such as those activities permitted by Connecticut law for certain nonprofit organizations during "Las Vegas nights." Conn. Gen. Stat. §§ 7-186a to 7-186p (1989).[5] Accordingly, counsel for the Tribe wrote a letter dated March 30, 1989 to the governor of Connecticut, William A. O'Neill, "to request that the State of Connecticut enter into negotiations with the Tribe for the purpose of entering into a Tribal-State compact governing the conduct of expanded gaming activities on the Tribe's reservation in Ledyard [, Connecticut]." By letter dated May 1, 1989, Governor O'Neill responded that he had requested that the State's Acting Attorney General, Clarine Nardi Riddle, review the IGRA and determine the State's obligations thereunder.

By letter dated July 19, 1989, Acting Attorney General Riddle advised the Tribe that the State would not negotiate concerning the operation of games of chance or "Las Vegas nights" on the reservation, since the Tribe only had a "right to conduct 'Las Vegas Nights' on the premises of the reservation subject . . . to those restrictions contained in the Connecticut General Statutes (§ 7-186a, et seq.) and the regulations of the Division of Special Revenue which are generally applicable

5 The games of chance that Connecticut permits at the "Las Vegas nights" include blackjack, poker, dice, money-wheels, roulette, baccarat, chuck-a-luck, pan game, over and under, horse race games, acey-ducey, beat the dealer, and bouncing ball. *See* Division of Special Revenue, Administrative Regulations: Operation and Conduct of Games of Chance § 7-186k-15 (1988).

to those groups authorized to conduct such a form of entertainment." The letter also stated that the State was willing "to negotiate, in good faith, with the Tribe, concerning other permissible forms of gaming in Connecticut," and that Governor O'Neill would "shortly be appointing a task force or negotiating team specifically for this purpose."

By letter dated August 1, 1989, counsel for the Tribe expressed to Acting Attorney General Riddle their pleasure "to hear of the impending appointment of a negotiating team for the State, and [their] hope to meet with [the] negotiating team as soon as possible," while soliciting an expression of the legal analysis underlying the State's view that it was under no obligation to negotiate concerning class III gambling. Responding by letter dated August 23, 1990, Acting Attorney General Riddle offered additional arguments for the State's position, discussed the State's amenability to litigation to resolve the issue, and raised the question whether the Tribe had enacted a gaming ordinance. Despite the State's asserted "readiness to resolve the issue of casino type gambling" on the Reservation, however, prior to this litigation the State never entered into actual negotiations with the Tribe, nor was the Tribe ever advised of the appointment of any negotiating committee by the State.

Section 2710(d)(7)(B)(i) authorizes an Indian tribe to commence an action in district court against a state for failure to negotiate if a 180-day period has elapsed since the tribe requested that the state enter into negotiations. On November 3, 1989, after more than 200 days had elapsed since the Tribe requested negotiations, the Tribe filed its complaint in this action in the United States

District Court for the District of Connecticut, invoking jurisdiction under section 2710(d)(7)(A)(i).

On January 25, 1990, the Tribe moved for summary judgment: (1) declaring that the State is required by the IGRA to negotiate with the Tribe concerning the terms of operation of games of chance on the Reservation, including any rules concerning prizes, wagers and frequency; (2) ordering the State and Tribe to conclude a tribal-state compact governing gaming activities on the Reservation within sixty days pursuant to section 2710(d)(7)(B)(iii); and (3) ordering the appointment of a mediator to resolve any impasse in accordance with section 2710(d)(7)(B)(iv)-(vii).

The State cross-moved for summary judgement on February 23, 1990. The State contended that the district court lacked jurisdiction because the Tribe had not yet adopted a tribal ordinance permitting casino-type gambling on the Reservation, which in the State's view was required by section 2710(d)(1)(A) as a prerequisite to any obligation to negotiate. The State also argued that no comparable class III gaming activity was permitted in the state, as required by section 2710(d)(1)(B).

The Tribe contended that the only precondition to negotiation was a request to negotiate in accordance with section 2710(d)(3)(A), which had been made, and that because the State permitted certain non-profit organizations to conduct "Las Vegas nights," the games of chance the Tribe desired were generally permitted, albeit regulated, within the meaning of section 2710(d)(1)(B).

On May 15, 1990, the district court granted summary judgment in favor of the Tribe and denied the State's

cross-motion. The court ordered the State to "enter into good faith negotiations with the Tribe for the purpose of formulating a Tribal-State compact governing the conduct of games of chance defined in Conn. Gen. Stat. § 7-186a, *et seq.*, on its reservation," and ordered further that the State and the Tribe conclude a tribal-state compact within sixty days of the ruling, in accordance with section 2710(d)(7)(B)(iii). The State appealed to this court on May 25, 1990.

On June 5, 1990, the district court modified its judgment, pursuant to Fed. R. Civ. P. 62(c), to provide that the deadline for conclusion of the Tribal-State compact was extended to within sixty days of June 5, 1990. The district court denied, however, appellants' motion for a stay pending appeal to this court. On June 14, 1990, this court also denied a motion for a stay of the district court order pending appeal, but ordered that the appeal be expedited. At oral argument, this court denied the State's renewed motion to stay the order to negotiate pending the outcome of this appeal, as well as the State's alternative motion that the sixty-day negotiation period be renewed. On August 14, 1990, the district court approved the parties' joint request to extend the negotiation period, setting a new deadline of September 21, 1990.

Discussion

A. *The State's Obligation to Negotiate.*

The State first contends that no obligation to negotiate a compact has yet arisen, because the Tribe has not adopted a tribal ordinance that has been approved by the chairman of the NIGC and authorizes the conduct

of Class III gaming on the Reservation, as required by subparagraph (A) of section 2710(d)(1), and the adoption of such an ordinance is a precondition to the State's obligation to negotiate a tribal-state compact regarding class III gaming. We disagree.

Section 2710(d)(1) on its face lists several conditions that must be satisfied before a tribe can lawfully engage in class III gaming. Although the adoption of an appropriate tribal ordinance is the first requirement set forth in section 2710(d)(1), nothing in that provision requires sequential satisfaction of its requirements, nor does its legislative history suggest that a tribal ordinance must be in place before a state's obligation to negotiate arises. Indeed, section 2710(d)(2)(C) provides that effective with the publication of a tribal ordinance in the Federal Register, "class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe *that is in effect*" (emphasis added), thus suggesting that the consummation of the compact will *precede* enactment of the tribal ordinance.

Moreover, the IGRA plainly requires a state to enter into negotiations with a tribe upon request. Section 2710(d)(3)(A) provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, *shall request* the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. *Upon receiving such a request,*

> *the State shall negotiate* with the Indian tribe in good faith to enter into such a compact.

Id. (emphasis added). Further, the IGRA permits a tribe to initiate an action upon the state's failure to negotiate, after a waiting period timed from the date of the request. *See* § 2710(d)(7)(B). Thus, the only condition precedent to negotiation specified by the IGRA is a request by a tribe that a state enter into negotiations.

Finally, the State's argument that the adoption of a tribal ordinance must occur first among the three conditions specified in section 2710(d)(1) because it is listed first (in subparagraph (A)) encounters the obstacle that the condition which is listed second (in subparagraph (B)) will, of necessity, preexist and precede the adoption of a tribal ordinance. Subparagraph (B) requires that the proposed gaming activities be "located in a State that permits such gaming for any purpose by any person, organization, or entity." Obviously, if a state does not permit "such gaming," the matter is at an end, and the adoption of a tribal ordinance will never occur.

For all the foregoing reasons, the district court correctly concluded that the State was required to negotiate with the Tribe upon request.

B. *Gaming Activities Subject to Negotiation.*

The State next contends that the class III gaming as to which the Tribe seeks to negotiate is not gaming that the State "permits . . . for any purpose by any person, organization, or entity" within the meaning of section 2710(d)(1)(B). Specifically, the State argues that its limited authorization of the conduct of "Las Vegas nights" by nonprofit organizations does not amount to a general allowance of "such [casino-type] gaming," within the

contemplation of section 2710(d)(1)(B), as the Tribe would institute; and further that such gaming activity is contrary to the State's public policy. Thus, the State urges, since the condition of subparagraph (B) of section 2710(d)(1) has not been satisfied, the State is not obligated to negotiate the tribal-state compact envisioned by subparagraph (C).

Pursuant to Conn. Gen. Stat. §§ 7-186a to 7-186p (1989), the State sanctions "Las Vegas nights" conducted by "[a]ny nonprofit organization, association or corporation." § 7-186a(a) and (b). Such entities "may promote and operate games of chance to raise funds for the purposes of such organization, association or corporation," § 7-186a(b), subject to specified conditions and limitations as to, *inter alia*, the status of the sponsoring organization, size of wagers, character of prizes, and frequency of operations. The district court concluded that the games of chance that the Tribe seeks to conduct constitute "such gaming" as is permitted by Connecticut law at "Las Vegas nights," and that the Tribe's contemplated activities therefore constituted permissible class III gaming activities in the State. In our view, the district court correctly decided the issue.

At the outset, we note the congressional "find[ing]," set forth in section 2701(5), that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." This declaration is consistent with the Supreme Court's pre-IGRA ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987):

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [the area] of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory . . . . The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209.

Further, the Senate Report specifically adopted the *Cabazon* rationale as interpretive of the requirement in section 2710(b)(1)(A) that class II gaming be "located within a State that permits such gaming for any purpose by any person, organization or entity," declaring (under the heading "Statement of Policy"):

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

Senate Report at 6; *see also United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990) (as to section 2710(b)(1)(A) and class II gaming, "the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity.").

We deem this legislative history instructive with respect to the meaning of the identical language in section 2710(d)(1)(B), regarding class III gaming, which we must interpret.[6] "It is a settled principle of statutory construction that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.' " *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir.) (quoting *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949) (quoting *Lewellyn v. Harbison*, 31 F.2d 740, 742 (3d Cir. 1929))), *cert. denied*, 436 U.S. 930 (1978). Although the State correctly points out that this rule has its exceptions, none advanced by the State has any pertinence here.

The State nonetheless contends that the *Cabazon* criminal/prohibitory-civil/regulatory dichotomy should not be employed here, citing *United States v. Dakota*, 796 F.2d 186, 188-89 (6th Cir. 1986), and *United States v. Burns*, 725 F. Supp. 116 (N.D.N.Y. 1989), *appeal pending sub nom. United States v. Cook* (2d Cir. Nos. 90-1070, -1072, -1168, and -1179. *Dakota*, however, was a pre-IGRA case which ruled only "that the criminal/prohibitory-civil/regulatory test is inappropriate to an interpretation of 18 U.S.C. § 1955 [a provision of the Organized Crime Control Act of 1970]." 796 F.2d at 187-88; *see also Cabazon*, 480 U.S. at 213 (construing

6 We agree with the district court that, contrary to the State's contention, no significance should be accorded to the modest difference between the introductory language of section 2710(b)(1) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if . . . . ") and section 2710(d)(1) ("Class III gaming activities shall be lawful on Indian lands only if . . . . ").

Dakota). *Dakota* added that (unlike the IGRA): "18 U.S.C. § 1955 was not enacted for the benefit of Indian tribes." 796 F.2d at 188. *Burns*, like *Dakota*, involved the application of the *Cabazon* test to 18 U.S.C. § 1955 (1988). *See* 725 F. Supp. at 126.

The State's position, furthermore, is in direct opposition to the central premise of the IGRA with respect to class III gaming. The heart of the ultimate legislative compromise regarding class III gaming was described in these terms:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.

Senate Report at 13.

The compact process is therefore to be invoked unless, applying the *Cabazon* test, it is determined that the state, "as a matter of criminal law and public pol-

icy, prohibit[s] [class III] gaming activity." § 2701(5). Absent such a conflict, the interests of the tribe and state are to be reconciled through the negotiation of a compact, and, if negotiations fail to achieve a compact and it is determined that the state did not negotiate in good faith, through the litigation and mediation process prescribed by section 2710(d)(7)(A) and (B).

Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming.[7] The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible. Congress intended, on the contrary, that:

> Even if a tribe engages in class III gaming pursuant to a compact with the State, it does not necessarily follow that the tribe is subject to the entire body of State law on gaming. The tribe and the State may negotiate terms such as "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to,

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7 The State's brief and oral argument on appeal make it clear that this is the State's position, as did the letter from Acting Attorney General Riddle to the Tribe's counsel dated July 19, 1989 (Tribe could conduct class III gaming on Reservation only "subject . . . to those restrictions contained in the Connecticut General Statutes (§ 7-186a, et seq.) and the regulations of the Division of Special Revenue which are generally applicable to those groups authorized to conduct such a form of entertainment").

and necessary for, the licensing and regulation of such activity." 25 U.S.C.A. § 2710(d)(3)(C)(i).

Sisseton-Wahpeton, 897 F.2d at 366 n.10.

Finally, in support of its contention that class III gaming should be subjected to the full corpus of state laws and regulations with regard to gambling, the State points to a provision of the IGRA, 18 U.S.C. § 1166(a) (1988), which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." That provision expressly excludes from the definition of "gambling" subject to its coverage, however, "(1) class I gaming or class II gaming regulated by the [IGRA], or (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under [section 2710(d)(8)] that is in effect." § 1166(c).

We accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibatory-civil/regulatory test to class III gaming, and next consider whether the district court correctly concluded that Connecticut law regarding such gaming was regulatory rather than prohibitory. We also agree with this ruling.

In *Cabazon*, the Supreme Court found a California statute that allowed some forms of bingo, but not high stakes bingo, to be regulatory in nature, stating: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we

must conclude that California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211. In *Sisseton-Wahpeton*, the Eighth Circuit reached a similar conclusion with respect to the permissibility of blackjack as a grandfathered class II activity, reasoning that "many of the forms of gambling permitted by California are also permitted by South Dakota law, e.g., a State lottery, parimutuel horse race betting, and bingo. Consistent with *Cabazon*, we conclude that South Dakota regulates, rather than prohibits, gambling in general and blackjack in particular." 897 F.2d at 368.

So here, the district court concluded, after a careful review of pertinent Connecticut law regarding "Las Vegas nights," that Connecticut "permits games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State's public policy. Connecticut permits other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting."

We recognize that *United States v. Dakota*, 666 F. Supp. 989, 997-1000 (W.D. Mich. 1985), *aff'd on other grounds*, 796 F.2d 186 (6th Cir. 1986), and *United States v. Burns*, 725 F. Supp. 116, 126 (N.D.N.Y. 1989), *appeal pending sub. nom. United States v. Cook*, (2d Cir. Nos. 90-1070, -1072, -1168, and -1179, can be cited for the proposition that a state which allows charities to engage in episodic, regulated casino-type gambling may still be deemed to be in a prohibitive, rather than regulatory, posture as to *commercial* casino gambling of the type that the Tribe seeks to operate. Neither of these cases, however, interpreted the IGRA, the pertinent provision of which requires an inquiry whether the affected

state "permits such gaming for *any* purpose by *any* person, organization, or entity." § 2710(d)(1)(B) (emphasis added). Construing this provision in light of *Cabazon* and *Sisseton-Wahpeton*, we conclude, in agreement with the district court, that the Connecticut law applicable to class III gaming is regulatory rather than prohibitive.

This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. We necessarily leave to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation.

C. The Negotiation Mandate.

Finally, the State contends that under the admittedly mandatory provision of section 2710(d)(7)(B)(iii), the district court is required to order the State and the Tribe to conclude a tribal-state compact within sixty days only if it finds that "the State has failed to negotiate in good faith with the Indian tribe," *id.*, with respect to such a compact. Maintaining that the court below "nowhere found that the State had failed to negotiate in good faith," the State argues that the district court's order directing the conclusion of a compact within sixty days must be reversed.

The district court made no express finding as to the State's lack of good faith, probably because the State did not raise the issue below. As the district court noted in its Ruling on Motion for Stay of Judgment, the State "did not specifically object to the sixty-day requirement or assert that it was not applicable in this instance."

Thus, the issue was not preserved for appeal. *See Radix Org., Inc. v. Mack Trucks, Inc.*, 602 F.2d 45, 48 (2d Cir. 1979). In any event, the State's contention fails on the merits.

First, despite the absence of an explicit finding as to the State's good faith, the district court substantially addressed that issue. The court (1) noted at the outset of its Ruling on Cross-Motions for Summary Judgment that "[the Tribe] asserts that the State has not appointed [a negotiating] team nor commenced negotiations and that over six months has [sic] elapsed since [the Tribe's] request [to negotiate];" (2) addressed in that opinion the central issue whether the State was obligated to negotiate in good faith; and (3) entered a judgment directing the State to "enter into good faith negotiations with the Tribe."

Furthermore, the jurisdictional provision of the IGRA vests jurisdiction in district courts over "any cause of action . . . arising from the failure of a State to enter into negotiations . . . *or* to conduct such negotiations in good faith." § 2710(d)(7)(A)(i) (emphasis added). In addition, section 2710(d)(7)(B)(ii) provides that:

> [U]pon the introduction of evidence by an Indian tribe that—
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> (I) a Tribal-State compact had not been entered into . . . , and
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> (II) the State did not respond to the request of the Indian tribe to negotiate such a compact *or* did not respond to such request in good faith,
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> the burden of proof shall be upon the State to prove that the State *has negotiated with the Indian*

tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

25 U.S.C. § 2710(d)(7)(B)(ii) (1988) (emphasis added).

When a state wholly fails to negotiate, as did Connecticut in the instant case, it obviously cannot meet its burden of proof to show that it negotiated in good faith. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("there is no occasion to consider the issue of good faith if a party has refused even to negotiate").

The State's protestations that its failure to negotiate resulted from sincerely held views as to the meaning of the IGRA, and that it declared its willingness to resolve these legal issues of first impression by litigation, do not alter the outcome. The statutory terms are clear, and provide no exception for sincere but erroneous legal analyses. Further, the manifest purpose of the statute is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good faith, for 180 days after a tribal request to negotiate. The delay is hardly ameloriated because the state's refusal to negotiate is not malicious.

Conclusion

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE :

—vs— : Civil No. H-89-717 (PCD)

STATE OF CONNECTICUT, et al. :

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff sues under the Indian Gaming Regulation Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*,[1] and now moves for summary judgment: (1) ordering the State, as required by IGRA, to negotiate with the Tribe concerning the terms of operation of games of chance, as defined by Conn. Gen. Stat. § 7-186a, *et seq.*, on the Reservation, including any rules concerning prizes, wagers and frequency; (2) ordering the State and Tribe to conclude a Tribal-State compact governing gaming activities on the Reservation within sixty days of the date of this order pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and to appoint a mediator to resolve any impasse in accordance with 25 U.S.C. § 2710(d)(7)(B)(iv).

Defendants cross-move arguing that this court lacks jurisdiction to entertain the present action since the Tribe has failed to adopt a tribal ordinance which would permit casino-type gambling upon the reservation. Defendants also contend that the "Las Vegas nights" which the State permits non-profit organizations to conduct are not comparable to

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[1] District courts have jurisdiction over a cause of action by an Indian tribe alleging the failure of a State (a) to negotiate with the Tribe for the purpose of forming a Tribal-State compact or (b) to conduct such negotiations in good faith. 25 U.S.C. § 2710(d)(7)(A)(i).

casino-type gambling and hence are not permissible Class III gambling activity pursuant to 25 U.S.C. § 2710(d)(1)(B).

Background

On March 30, 1989, the Tribe requested Governor O'Neill to enter negotiations for the purposes of forming a Tribal-State compact governing gaming activities on the Tribe's reservation pursuant to IGRA. On May 1, 1989, the Governor responded that he had requested the State's Acting Attorney General to review IGRA and determine the State's obligations thereunder.

The State permits certain types of organizations to conduct games of chance at Las Vegas nights subject to the restrictions in Conn. Gen. Stat. § 7-186a, *et seq.* On July 19, 1989, Acting Attorney General Riddle advised that the fact that Connecticut permits Las Vegas nights does not compel it to negotiate with the Tribe under IGRA when the ultimate purpose is construction and operation of a casino.[2] The State recognized its responsibility under IGRA to negotiate in good faith concerning other forms of gaming permitted in Connecticut and did not dispute the Tribe's right to conduct Las Vegas nights subject to statutory and regulatory restrictions. She also noted that the Governor would shortly appoint a task force or negotiating team for that purpose.

Plaintiff asserts that the State has not appointed such a team nor commenced negotiations and that over six months has elapsed since its request. The State contends that it is under no obligation to enter into negotiations until plaintiff adopts a tribal ordinance governing its proposed gaming activities. The State also asserts that it "would gladly participate in 'friendly' litigation designed to secure a federal court declaration of the permissibility of casino gambling on the reservation."

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[2] Plaintiff seeks a compact permitting the Tribe to expand its high-stakes bingo to games of chance without the wager and prize limits imposed by state law. Exhibit C to Plaintiff's Motion.

Discussion

IGRA defines the rights of Indian tribal governments to conduct gaming activities on their reservations. The Act settled the legislative debate which followed court decisions upholding the right of tribes to conduct public bingo games on Indian lands. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987); *Mashantucket Pequot Tribe v. McGuigan,* 626 F.Supp. 245 (D.Conn. 1986); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy,* 694 F.2d 1185, 1187 (9th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth,* 658 F.2d 310, 313 (5th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982); *Oneida Tribe of Indians v. Wisconsin,* 518 F.Supp. 712, 720 (W.D. Wis. 1981). IGRA provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

IGRA establishes three classes of gaming which are subject to differing degrees of federal, state, and tribal regulation. Class I gaming is limited to social games, either ceremonial or for nominal prizes, 25 U.S.C. § 2703(6), and is free of all outside regulation. *Id.,* § 2710(a)(1). Class II gaming includes bingo and related games, as well as certain non-banking card games, i.e., games played against other players as opposed to the house. *Id.,* § 2703(7). These games are free of state regulation but subject to some federal oversight by the National Indian Gaming Commission ("NIGC"). *Id.,* §§ 2710(b), (c).

All other forms of gaming are classified as class III gaming. 25 U.S.C. § 2703(8). Class III gaming activities are lawful on Indian lands only if such activities are:

> (A) authorized by an ordinance or resolution that —
> (i) is adopted by the governing body of the Indian

tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this section, and (iii) is approved by the Chairman [of the NIGC], (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1).

A. State's Obligation to Negotiate in Good Faith

In its first claim for relief, plaintiff contends that "[t]he State's failure to negotiate in good faith to conclude a Tribal-State compact governing the conduct of gaming activities violates [IGRA]." Complaint, ¶ 13. IGRA provides that any tribe having jurisdiction over lands upon which class III gaming is to be conducted shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a compact governing such gaming and that, upon receiving such request, the State shall negotiate with the tribe in good faith to enter into such a compact. 25 U.S.C. § 2710(d)(3)(A).

It is undisputed that plaintiff, on March 30, 1989, requested the State to enter into negotiations under IGRA. A tribe may not initiate a cause of action for a State's failure to negotiate until 180 days after it requested the State to enter negotiations. 25 U.S.C. § 2710(d)(7)(B)(i). Plaintiff filed its complaint on November 3, 1989, over two hundred days after its request. If the court finds that the State has failed to negotiate in good faith, it shall order the State and tribe to conclude a compact within sixty days or, in the event of an impasse, submit the dispute to a court-appointed mediator. *Id.*, § 2710(d)(7).

The parties dispute whether plaintiff's March 30, 1989 letter triggered the State's obligation to enter into compact negotiations. The State argues that no obligation arose, despite the request, until the tribe adopted an ordinance permitting the type of gambling proposed upon its lands, in this instance casino gambling, and obtained the approval of the Chairman of NIGC. The State argues that the plain language of IGRA establishes the order in which the prerequisites to class III gaming must occur, i.e., authorization under a tribal ordinance; location in a permitting state; and conduct under a Tribal-State compact. 25 U.S.C. § 2710(d)(1). Plaintiff argues that IGRA sets no pre-condition for negotiations other than a tribal request, as it flatly states that, upon receiving a request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*, § 2710(d)(3)(A).

The State's argument that a tribal ordinance is a condition precedent to any obligations to negotiation a compact covering class III gaming is based on § 2710(d)(1). This section, however, does not articulate any time sequence. It sets forth three conditions for class III gaming to be lawful on Indian lands. That a tribal ordinance is listed first, as a requirement, does not establish it as a precondition to compact negotiations. Further, § 2710(d)(2)(C) provides that, even with publication of a tribal ordinance approved by the Commissioner, class III gaming activity shall be fully subject to the terms and conditions of the compact. IGRA does not expressly precondition compact negotiations on publication of an effective tribal ordinance.

Second, the State contends that absent an enabling ordinance, a request for negotiation produces an incongruous result. The State argues that it should not be compelled to expend resources in negotiation only to have the tribe's governing body fail to adopt an ordinance approving all or the particular form of class III gaming contemplated in the

negotiated compact.[3] Adoption of an ordinance as a precondition to any negotiations would encourage the Tribe to adopt an ordinance authorizing all forms of class III gaming to avoid limiting its bargaining position. Plaintiff asserts that it sought to negotiate a compact consistent with its objectives, and which at the same time would accommodate the State's concerns. Plaintiff argues that an appropriate ordinance cannot be framed until it knows the type and scale of gaming to which the state would agree and the relative jurisdictional roles to be played by the Tribe and the State.

The State does not offer any reason why the plain language of IGRA, which requires the State to enter negotiations based solely upon a tribal request, should be ignored. Nowhere does IGRA require, either expressly or implicitly, that an ordinance be adopted and approved prior to compact negotiations. Upon receiving a request to enter into compact negotiations, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). The obligation to negotiate cannot be more plain or unconditioned.

The State contends that treating the ordinance requirement as a precondition to compact negotiations will ensure that any request to negotiate is received from an authorized representative of the tribe. The State does not contend nor show that there is any lack of authority in this instance. Further, the State has ample methods to ensure that a request validly invokes IGRA and constitutes the authorized request of the tribal council. An ordinance is not the only manifestation of a tribe's genuine request for compact negotiations. This State argument is meritless.

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[3] IGRA expressly authorizes the governing body of the Tribe to adopt an ordinance or resolution revoking any prior authorization of class III gaming thus rendering such activity illegal on tribal lands. 25 U.S.C. § 2710(d)(2)(D). Thus, even under the State's concept of the sequence of the requisite steps, the State could negotiate a compact which could be rendered meaningless by subsequent tribal action.

Congress is thus found to have defined unambiguously a single precursor to the State's obligation to enter compact negotiations, i.e., a request from the tribe. 25 U.S.C. § 2710(d)(3)(A). Neither the language of nor congressional intent underlying IGRA warrant finding an additional precondition to negotiation. Accordingly, plaintiff's motion for summary judgment is granted as to its first claim for relief and defendants' cross-motion is denied.

B. Scope of Negotiations

The parties cross-move for declaratory relief as to whether the State is obligated to negotiate in good faith regarding the conduct of games of chance, as defined by Conn. Gen. Stat. § 7-186a, *et seq.*, including the days and hours of operation, types of wagers, and wager and pot limits. IGRA provides that, in the event of an impasse in compact negotiations, the parties shall submit their last best offer to a court-appointed mediator for his selection of the one "which best comports with the terms of [IGRA] and any other applicable federal law and with the findings and order of the court." 25 U.S.C. § 2710(d)(7)(B)(iv). Plaintiff argues that the court can thus provide guidance to the mediator on relevant issues and that such guidance will reduce the likelihood of an impasse. Since both parties seek declaratory relief on the same issue and "the controversy is definite and concrete, touching the legal relations of parties having adverse legal interest," declaratory relief is appropriate. *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 240-41 (1937).

Plaintiff seeks a declaration that the State must negotiate the conduct of games of chance, commonly referred to as "Las Vegas nights", to be conducted on the reservation. The issue presented is "whether the State can impose *all* of the restrictions imposed on charitable Las Vegas nights on tribal games of chance, without *any* negotiations." Plaintiff's Reply Memorandum at 10. The State asserts that it is not obliged to negotiate the scope of such games of chance

to be conducted on the reservation since it does not generally permit "such gaming."

IGRA permits a tribe to conduct class III gaming if, among other requirements, it is "located in a state that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Connecticut permits "[a]ny nonprofit organization, association or corporation [to] promote and operate games of chance [or Las Vegas nights] to raise funds for the purposes of such organization" subject to certain limitations and restrictions, such as limits on the size of wagers, character of prizes, and frequency of operation. *See* Conn. Gen. Stat. § 7-186a, *et seq.;* Conn. Agencies Regs. § 7-186k-1, *et seq.* Plaintiff contends that, since Las Vegas nights are permitted by the State, they fall within the "such gaming" language of IGRA and that therefore the State is obligated to negotiate the terms of a Tribal-State compact permitting the tribe to operate such games of chance. 25 U.S.C. § 2710(d)(3)(A). "In practical terms, the question is whether the Tribe can bargain for higher prize and bet limits and more frequent operation of the same types of games employed at Las Vegas nights, so as to enhance the utility of this form of gaming as a source of revenue." Plaintiff's Memorandum at 14-15.

The State argues that the use of the phrase "such gaming" as opposed to "such *type* of gaming" evidences the intent of Congress that, with regard to class III gaming, only the actual forms of gambling which the State has legalized need to be the subject of compact negotiations. Further, the State asserts that its interpretation is supported by the congressional findings prefacing IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). The State argues that if the restrictions it has imposed on Las Vegas nights are removed, such gaming becomes professional gambling which

is prohibited in Connecticut as a matter of criminal law and public policy.

In interpreting the "such gaming" language of IGRA, the "starting point as in all cases involving statutory interpretation, 'must be the language employed by Congress.' " *United States v. Goodyear Tire & Rubber Co.*, 110 S.Ct. 462, 467 (1989), quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where the plain language is not instructive, a review of legislative history can shed light on Congressional intent. Further, "when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place." *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978).

Congress used nearly identical language in defining the prerequisites to both class II and III gaming. *Compare* 25 U.S.C. § 2710(b)(1)(A) *with* 25 U.S.C. § 2710(d)(1)(B). Both classes are permissible on Indian lands if "located [within, § 2710(b)(1)(A), or in, § 2710(d)(1)(B),] a State that permits such gaming for any purpose by any person, organization or entity." Plaintiff points to the analysis underlying a pre-IGRA line of cases holding tribal bingo games to be lawful in states which permit but regulate charitable bingo. *See, e.g., Cabazon*, 480 U.S. 202. The legislative history notes that the provisions regarding class II gaming, primarily bingo, were intended to be consistent with the tribal rights recognized in *Cabazon*. S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3079.

In *Cabazon*, the Tribe operated public bingo games, as well as a card club, on its reservation. The State sought to bar Tribal bingo relying on a statute which permitted bingo only when conducted by a charitable organization and operated by its members on a voluntary basis, required that profits be segregated and used solely for charitable purposes, and imposed prize limits. The court applied a regulatory/prohibitory analysis and held that tribes have a right to

conduct gaming on Indian lands without state regulation if located in a state which permits, subject to regulation, the gaming. *Cabazon*, 480 U.S. at 209–10. The "shorthand test" was "whether the conduct at issue violates the State's public policy." *Id.* at 209. The court rejected California's contention "that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations" and held that tribes have a right to conduct gaming on Indian lands without state regulation if located in a state which regulates rather than prohibits the gaming in issue. *Id.* at 210–11.[4] In enacting IGRA, Congress anticipated "that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed[, i.e., located within a State which permits such gaming, § 2710(b)(1)(A)] in certain States." S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3076.

The State contends that Congress has restricted use of the *Cabazon* analysis to questions regarding class II gaming. It also contends that Congress has itself recognized that class III gaming was to be accorded substantially different treatment.[5] Although Congress did employ a different balance of

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[4] In *Cabazon*, the state did not prohibit all forms of gambling and, in fact, encouraged its citizens to participate in a daily state-run lottery. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, . . . [the court] conclude[d] that California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211.

[5] The State also contends that the different prefatory language of the requirements with respect to class II and class III gaming must be considered in determining whether to apply similar statutory constructions. With respect to class II gaming, IGRA provides that "[a]n Indian tribe may engage in" class II gaming subject to two prerequisites. 25 U.S.C. § 2710(b)(1). The State contends that this is a clear, affirmative grant of

(continued)

federal, state, and tribal oversight with respect to class III gaming, both class II and III gaming are made contingent on a common requirement, i.e., location in a State that permits such gaming. That Congress used nearly identical language evidences an intent that the two be afforded the same construction. Accordingly, opinions construing the term "such gaming" in § 2710(b)(1)(A) can provide guidance in interpreting the same term in § 2710(d)(1)(B).

In *United States v. Sisseton-Wahpeton Sioux Tribe ("SWST")*, 897 F.2d 358 (8th Cir. 1990), the question was whether a blackjack game operated by a tribe was lawful as located within a state permitting such gaming. The blackjack, which was permitted under state law, was subject to a $5 bet limit. The district court held that the tribe's blackjack game, which allowed bets of up to $100, was a different type of gaming than that statutorily permitted and thus did not satisfy the requirement that it be conducted in a state which permits such gaming. *Sisseton-Wahpeton Sioux Tribe ("SWST") v. United States*, 718 F. Supp. 755, 758 (D.S.D. 1989). The district court noted that "if a non-Indian within a state can engage in the particular type of gaming venture, then an Indian tribe in that state may also pursue the same endeavor." *SWST*, 718 F. Supp. at 758. The eighth circuit reversed holding that "Congress intended that class II gaming be subject to tribal and federal oversight, and that the states' regulatory role be limited to overseeing class III

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[5] *(continued)*
authority to the tribe to conduct such gaming, which contrasts decidedly with the prefatory language to the requirements for class III gaming which provides that such gaming "shall be lawful on Indian lands only if" certain preconditions are met. *Id.*, § 2710(d)(1).

While the prefatory language is distinct and must be considered, it does not provide, nor does there appear to be, a reason why the different prefatory language warrants different constructions of the identical "permits such gaming" requirement. The different prefatory language merely recognizes the additional requirement with respect to class III gaming that it is lawful only if conducted in accordance with a Tribal-State compact.

gaming, pursuant to a Tribal-State compact." *SWST*, 897 F.2d at 364. The court reasoned that permitting the State to apply its substantive law to class II gaming would conflict with IGRA's statutory scheme. *Id.*

Plaintiff here does not contend that it should be free to operate games of chance without State oversight. Rather it argues that any proposed games of chance on the reservation should not automatically be subject to all the restrictions imposed on Las Vegas nights by the state law but that IGRA requires the State to bargain with the Tribe over the scope of tribal gaming operations and the extent of State jurisdiction over such gaming.

In *SWST*, 897 F.2d at 364, the government argued that, with respect to either class II or III gaming, state law may supply substantive regulations on gaming. IGRA's requirement that the State permit such gaming was noted to be an "instance of Congress assimilating state law by reference." *Id.* Since the state's regulatory role with respect to class III gaming is limited to oversight pursuant to a Tribal-State compact, the court found application of state substantive law to conflict with IGRA's purpose. *Id.* The court rejected the state's argument on the basis that IGRA "contains no explicit abrogation of the right of tribes to conduct gaming without being subject to state regulation if the tribe is located in a state which regulates but does not prohibit gaming." *Id.* at 366.

The legislative history recites that "[t]he mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact . . . S.555 [does not] contemplate the extension of State jurisdiction or the application of State laws for any other purpose." S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3075–76. "Even if a tribe engages in class III gaming pursuant to a compact with the State, it does not

necessarily follow that the tribe is subject to the entire body of state law on gaming." *SWST*, 897 F.2d at 366 n.10. IGRA contemplates compact negotiations regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity." 25 U.S.C. § 2710(d)(3)(C)(i). Further, "state law on periods of operation is not necessarily imposed even upon class III gaming; rather, it is subject to negotiation." *SWST*, 897 F.2d at 367 n.11; *see also* S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3084 (compact negotiations may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility).

The determinative issue is whether Connecticut law governing "Las Vegas nights" is prohibitory, or merely regulatory. Section 7-186a(b), Conn. Gen. Stat., permits certain nonprofit organizations to operate games of chance for charitable purposes. The regulations list the permissible games to include blackjack, poker, dice, roulette, baccarat and other common casino games. Conn. Agencies Reg. § 7-186k-15. The nonprofit organization must have been in existence for two years and that the promotion and operation of the games must be conducted only by members of the group on a voluntary, nonremunerative basis. Conn. Gen. Stat. § 7-186a(b). No persons under 18 may conduct, operate or play such games and all funds derived must be used for the purposes of the sponsoring organization. *Id.* The state also imposes wager and prize limits: wagers cannot be made in money but only in chips or representations of money purchased for cash; a twenty-five dollar bet limit is imposed; winnings are only redeemable for prizes, merchandise, or goods, or for coupons or certificates for such merchandise or goods. Conn. Gen. Stat. § 7-186c(c). Criminal penalties are provided for violations — maximum $500 fine and/or 90 days for first offense; $1000 fine and/or one year for subsequent offenses. *Id.*, § 7-186*l*. The receipt of Las Vegas night proceeds, other than a fixed rental fee, by a dealer in gaming equipment is considered profes-

sional gambling. Conn. Gen. Stat. § 53-278a(3), and prohibited by Conn. Gen. Stat. § 53-278b(b). Conn. Gen. Stat. § 7-186e.

The State argues that "Las Vegas nights" are not akin to commercial casino-type gambling which is not permitted in Connecticut. *See United States v. Dakota*, 796 F.2d 186, 189 n.4 (6th Cir. 1986) (recognizing distinction between commercial casino gambling and charitable "millionaire parties"). However, this argument would impermissibly subject plaintiff to the full extent of Las Vegas night regulation without negotiation. Games of chance are not prohibited in Connecticut. They are permitted but subject to extensive regulation and limitation. That a violation of the regulations may result in penal sanctions does not make them prohibitory. *See McGuigan*, 626 F. Supp. at 249.

The type of gaming permitted is identified by the type of play permitted, not by bet, frequency, and prize limits. The statute at issue in *Cabazon* permitted bingo only when conducted by a charitable organization subject to the limitations that profits be used solely for charitable purposes and prizes not exceed $250 per game. 480 U.S. at 205. Violation of these provisions constituted a misdemeanor. The tribes engaged in unregulated, high stakes bingo. Nonetheless, the state was held to have no authority to apply its bingo ordinances to tribal bingo because such gaming was regulated not prohibited. *Id.* at 210–11. Similarly, in *SWST*, 897 F.2d 358, the fact of a significantly higher bet limit than the law permitted was held not to make the tribe's blackjack game a different type of gambling for IGRA purposes than what was authorized by state law.

Connecticut permits games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State's public policy. Connecticut permits other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting. High amounts may be bet and substantial winnings are permitted. Connecticut "regulates, rather than prohibits, gambling in general and

[games of chance] in particular." *SWST*, 897 F.2d at 368. "[T]he legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Id.* at 365. IGRA balances the Tribe's autonomy as a sovereign and the State's regulatory interest over gaming operations within its borders. These interests are accommodated by requiring negotiations aimed at a Tribal-State compact governing the conduct of class III gaming activities. *See* S. Rep. No. 100-446, 100th Cong., 2d Sess., 1988 U.S. Code Cong. and Admin. News 3071, 3083 ("[B]oth State and tribal governments have significant governmental interests in the conduct of class III gaming [and] are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States.").

Accordingly, plaintiff's request for negotiation meets IGRA's requirement. The class III gaming which plaintiff wishes to conduct is "such gaming" as the state permits and is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(b)(1)(A). Plaintiff's motion for summary judgment on its second claim for relief is granted and defendants' cross-motion is denied.

Judgment shall enter for plaintiff:

1. Declaring that the State shall enter into good faith negotiations with the Tribe for the purpose of formulating a Tribal-State compact governing the conduct of games of chance defined in Conn. Gen. Stat. § 7-186a, *et seq.*, on its reservation.

2. Ordering that the State and the Tribe conclude a Tribal-State compact within sixty (60) days of this ruling. 25 U.S.C. § 2710(d)(7)(B)(iii).

SO ORDERED.

Dated at Hartford, Connecticut, this 15th day of May, 1990.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE	)	
	)	
VS.	)	CIVIL H-89-717 PCD
	)	
STATE OF CONNECTICUT, ET AL.	)	

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having its filed its Ruling on Cross-Motions for Summary Judgment, granting the plaintiff's motion on its second claim for relief and denying the defendants' cross-motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiff in accordance with the Court's Ruling on Cross-Motions for Summary Judgment dated May 15, 1990.

Dated at Hartford, Connecticut, this 15th day of May 1990.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE	)	
	)	
VS.	)	CIVIL H-89-717 PCD
	)	
STATE OF CONNECTICUT, et al.	)	

MODIFIED JUDGMENT

This action having come on for consideration of the defendants motion for stay of judgment pursuant to Fed. R. Civ. P. 62(c) before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Motion for Stay of Judgment, denying the motion bu modifying the judgment as follows: the State and the Tribe are hereby ordered to conclude Tribal-State compact within sixty (60) days of this ruling,

It is accordingly ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered modified ordering the State and the Tribe to conclude a Tribal-State compact within sixty (60) days.

Dated at Hartford, Connecticut, this 5th day of June, 1990.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RECEIVED JUN 4 1990

MASHANTUCKET PEQUOT TRIBE	:	
	:	
—vs—	:	Civil No. H-89-717 (PCD)
	:	
STATE OF CONNECTICUT, et al.	:	

RULING ON MOTION FOR STAY OF JUDGMENT

Defendants move under Fed. R. Civ. P. 62(c) to stay the judgment entered by this court on May 15, 1990 pending an appeal to the Second Circuit. That judgment ordered the State to enter into good faith negotiations with the Tribe for the purpose of formulating a Tribal-State compact governing the conduct of games of chance defined in Conn. Gen. Stat. § 7-186a, *et seq.*, on its reservation and that the parties conclude such a compact within sixty (60) days of this ruling. 25 U.S.C. § 2710(d)(7)(B)(iii).

Issuance of a stay pending appeal under Rule 62(c) is discretionary and equitable, requiring the court to balance the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the prevailing party; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1986); *Hayes v. City University of New York*, 503 F. Supp. 946, 962 (S.D.N.Y. 1980), *aff'd*, 648 F.2d 110 (2d Cir. 1981).

The Second Circuit has held that a movant need only demonstrate a "substantial possibility" of success on appeal. *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985). This is based on the difficulty inherent in the post-judgment context

of convincing a judge who has not ruled in your favor that you are likely to be successful on appeal. *Hayes*, 503 F. Supp. at 963 (a party seeking a stay pending appeal is required to show only that its arguments raise a substantial possibility of success). The court should look to "external, preferably objective, indicia of the accuracy of his judgment" such as the extent the challenged decision is supported by precedent; and the standard of review that will govern on appeal. *Id.*

Defendants note that IGRA is a complex statutory compromise between competing sovereign interests and that the issues involved have never been interpreted at the appellate level with respect to class III gaming. Absent definitive appellate guidance and given the dearth of case law construing IGRA (enacted Oct. 17, 1988), this court recognizes that "it is operating in an area of uncertainty." *Hayes*, 503 F. Supp. at 963. However, while defendants' arguments are far from frivolous and present a question deserving of appellate consideration, they have not shown a "substantial possibility" of success. Defendants offer nothing beyond their assertion that it is "virtually impossible to predict the probability that either side will prevail." Defendants' Memorandum in Support at 3.

Defendants assert that the State will be irreparably harmed if it is forced to expend time, effort and finance on negotiations which are to result in the conclusion of a Tribal-State compact by July 15, 1990 before the Second Circuit rules that IGRA mandates such a result. William Drakeley, Deputy Executive Director of the Division of Special Revenue, asserts that the State's lack of experience in regulating class III gaming would make negotiations "a great burden on State finances, resources and personnel, and will require an effort of major and perhaps unreachable proportions."

Plaintiff contends that the order only requires the State to engage in good faith bargaining and that several more steps would be required before the Tribe could commence any class III gaming, i.e., a compact must be concluded and approved

by the Secretary and notice published in the Federal Register; a tribal ordinance is drafted and approved by the National Indian Gaming Commission and notice published in the Federal Register; and practical steps carried out to implement any such gaming. Further, it argues that if the negotiations fail to result in a compact in sixty days, an even longer mediation process is required under § 2710(d)(7)(B). The sixty period was not imposed by this court but by Congress in § 2710(d)(7)(B)(iii) presumably to expedite the negotiating process.

In an analogous context, the Supreme Court has held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). It also has been held in denying a motion to stay arbitration pending appeal of a decision granting a motion to compel arbitration that "the fact that an order to arbitrate imposes a cost, the cost of the arbitration, whether it is an opportunity cost of time or an out-of-pocket expense for lawyers or witness fees . . . does not show irreparable harm." *Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985).

Here the order to enter negotiations would not result in irreparable harm to the State. If the cost of negotiating were held to be irreparable harm, all orders entered under § 2710(d)(7)(B)(iii) would be candidates for stay. This would be in apparent conflict with Congress' mandate that "the court shall order the State and the Indian Tribe to conclude . . . a compact within a 60-day period." Defendants have been on notice since at least April of 1989 that plaintiff wished to enter negotiations with respect to class III gaming and since this suit was filed that plaintiff sought an order

that the parties conclude a Tribal-State compact within sixty days of any order resolving the matter in its favor.[1]

Balancing the relevant factors, the court finds that defendants have not met their burden of establishing that a stay pending appeal is appropriate under these circumstances. However, given the asserted complexity of the negotiating process, the delay occasioned by this motion, and the relatively short duration of the sixty-day period, the final judgment will be modified as follows: the State and the Tribe are hereby ordered to conclude a Tribal-State compact within sixty (60) days of this ruling. 25 U.S.C. § 2710(d)(7)(B)(iii).

SO ORDERED.

Dated at Hartford, Connecticut, this 1st day of June, 1990.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

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[1] Although defendants have consistently argued that a tribal ordinance must be adopted before the obligation to negotiate arises and that the public policy of Connecticut forbids casino gambling, they did not specifically object to the sixty-day requirement or assert that it was not applicable in this instance.

No. 90-871

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT AND
GOVERNOR WILLIAM A. O'NEILL,

Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.*, require a state to negotiate with a resident Indian tribe concerning the rules under which the tribe may operate games of chance on the Reservation, when the state permits such games of chance to be conducted by charitable organizations in the State at "Las Vegas nights"?

2. Does the Indian Gaming Regulatory Act, 25 U.S.C. §2710(d)(3)(A), require a state to negotiate with a resident Indian tribe for a tribal-state gaming compact upon receiving a request for such negotiations from the tribe, without regard to whether the tribe has adopted an ordinance governing such gaming?

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STATUTES INVOLVED

25 U.S.C. §§2710(d)(7)(A), (B)(i), (ii) and (iii) provide:

> (7)(A) The United States district courts shall have jurisdiction over –
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> >
> > (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
> >
> > (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).
>
> (ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –
>
> > (I) a Tribal-State compact has not been entered into under paragraph (3), and
> >
> > (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,
>
> the burden of proof shall be upon the State to prove that the State has negotiated with the

> Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.
>
> (iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –
>
> (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

I. SUMMARY OF ARGUMENT.

The Petition misstates the central question in this case. The Petition claims that the decision below compels the State to permit the Tribe to engage in commercial casino gambling. In fact, the decision only required the State to negotiate with the Tribe over the rules for casino-style games of chance which are permitted at charitable Las Vegas nights in Connecticut. The decision left open the question of whether existing state rules would apply to these games, or whether different rules would be established during negotiations. The bare obligation to

negotiate a compact presents neither a substantial nor an important issue of law.

The second question presented for review involves a narrow and technical contention that a tribal gaming ordinance must be adopted prior to a tribe's request for negotiations with the state. There is no basis for that contention in the statute, and the issue is not a question of general importance.

II. ARGUMENT.

A. The Question of Whether the Indian Gaming Regulatory Act Requires a State to Negotiate with a Tribe about Games of Chance Does Not Present an Important or Substantial Issue of Federal Law.

1. Petitioner misconstrues the issue presented.

Petitioner says that the central question presented in this case is as follows:

> Do the provisions of 25 U.S.C. §§2701-2721 (Indian Gaming Regulatory Act) compel a sovereign State to permit commercial casino gambling when the criminal laws and public policy of the State prohibit such gambling, except for a limited statutory variation which permits bona fida charitable groups, under rigid State licensure, to raise funds by operating "Las Vegas nights" . . .

Petition at (i). That is not the issue. If it were, there would be no controversy before the Court. Respondent agrees that the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.* (the "IGRA"), does not compel a state to permit

any particular form of Indian gaming. All it requires is that the state negotiate in good faith about the rules which will apply to reservation gaming. That is all the Court of Appeals decided:

> This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. We necessarily leave to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation.

Decision of the Court of Appeals, Appendix at 20A.

Contrary to Petitioner's assertion, nothing in the decisions below required the State "to stand aside and witness the arrival of casino gaming." Petition at 14. The sole issue posed below was whether the State had an obligation to negotiate about rules under which the Tribe could conduct those games of chance already permitted by the State itself at "Las Vegas nights". The District Court ruled that if a state permits charitable games of chance, the IGRA requires it to negotiate over the terms on which the same games can be conducted on the reservation. The Second Circuit affirmed. Both courts below addressed only the IGRA's requirement for negotiations. Far from declaring that the Tribe was "free to offer unlimited, high stakes casino gambling", Petition at 16, both courts expressly left open the possibility that the Tribe would, in the end, be subject to the State's existing limits on games of chance.

This case only arose because of the peculiar strategy adopted by Connecticut officials in response to the Tribe's

request to negotiate under the IGRA. When Connecticut received that request, it declined to negotiate. Instead, it took the position that it could impose all of its own rules on tribal gaming without negotiating at all. That tactical decision to stay away from the bargaining table narrowed the issues for consideration.

2. The issue presented is not a substantial question of law.

Properly understood, the questions presented in this case are neither substantial nor important. After a four-year legislative debate, and the ruling by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Congress settled the controversy over Indian gaming by passing the IGRA. The Court of Appeals described the requirement for negotiations over a tribal-state gaming compact as the "heart of the ultimate legislative compromise". Appendix at 16A.

The State's refusal to negotiate defied this central mandate of the IGRA. As the Court of Appeals described it:

> Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

Appendix at 17A.

Both the District Court and a unanimous Court of Appeals easily concluded that the State had violated the Act by its express refusal to even discuss the rules applicable to games of chance. There is nothing especially significant about this ruling. It simply enforces an unambiguous obligation against a recalcitrant State administration. There is no contrary decision by any other Court of Appeals or state court. A unanimous panel of the Eighth Circuit reached a substantially identical conclusion in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990). In its amicus brief filed in the Court of Appeals, the United States supported the Tribe's position. Brief for United States as Amicus Curiae in Support of Plaintiff-Appellee. In short, the issue is neither difficult nor important; it does not warrant review by this Court.

3. The ruling below is not a significant precedent.

While Petitioner suggests that this case will have broad impact on other states, no state needs to repeat Connecticut's error in refusing to even begin negotiations. Nothing in this case requires a state to agree to any particular form of tribal gaming in the course of negotiations. If agreement is not reached, the tribe may not proceed with gaming operations. The tribe's only recourse is to seek binding mediation under the IGRA. That recourse is *only* available if a federal court finds that the failure to reach agreement resulted from the state's failure to negotiate in good faith. The significant issues under the IGRA will focus on what constitutes "good faith" bargaining over gaming issues.

In that context, the IGRA expressly permits the court to consider a state's policy concerns in determining whether the state has negotiated in good faith:

> In determining in such an action whether a State has negotiated in good faith, the court –
>
> > (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities . . .

25 U.S.C. §2710(d)(7)(B)(iii). If a state takes part in serious negotiations, the IGRA clearly does not force it to agree to all of a tribe's demands.

If negotiations between a state and a tribe break down, and the tribe cannot show that the state failed to negotiate in good faith, then the IGRA provides no further relief to the tribe. As the Senate Report makes clear:

> Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated.

S.Rep. No. 100-446, 100th Cong., 2nd Sess., at 36, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 3071, 3084.

Although states may not simply impose all of their existing restrictions on tribal gaming without negotiations, they remain free to negotiate for narrow limits on reservation gaming. If such negotiations are pursued in good faith and fail, nothing further would be required by the decision below. This case did not reach any of the

potentially more substantial questions of how to define "good faith" bargaining by a state under the IGRA.

In this case, Connecticut might have entered negotiations but offered only a limited waiver of its Las Vegas Night rules, insufficient to permit commercial operations. Nothing decided below suggests that this would have been a failure to negotiate in good faith. Once ordered to submit its last best offer to a federal mediator, Connecticut could still have submitted a proposal limiting the Tribe to a non-commercial scale of casino gaming. Nothing in the decision below required the mediator to reject such a proposal.

Instead, for its own reasons, Connecticut submitted a proposed compact which gave the State control over licensing and oversight of any tribal casino, but contained no limits on the size or the stakes or the commercial character of such a casino. The compact selected by the mediator in accordance with the IGRA was the *State's own proposal*. Petition at 10-11. The outcome which the State protests is the result of its own voluntary choices, not anything imposed by the courts below. The decision below should have no impact on other states except to encourage them to engage more seriously in the negotiating process.

4. The Court of Appeals correctly construed the IGRA and the prior decisions of this Court.

The Petition argues that the decision below requires review because it "centers on the application of a rigid rule of statutory construction", because it misapplies this

Court's prior rulings, and because it is inconsistent with the legislative history of the IGRA. Petition at 15-16. These contentions are meritless.

The Court of Appeals fully explored both the language and the history of the IGRA. The Court of Appeals recognized the exceptions to the applicable rules of construction but found that "none advanced by the State has any pertinence here". Appendix at 15A.

The State suggests that the decision below erroneously applied this Court's guidance in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Court of Appeals' conclusion that Connecticut's laws on games of chance are regulatory in character is wholly consistent with *Cabazon*. Moreover, the particular character of Connecticut's law on Las Vegas nights is not a question of general importance which requires resolution by this Court. This Court ordinarily accepts the Court of Appeals' considered judgment concurring with the District Court on a question heavily dependent on an analysis of the laws of a state within that Circuit. *Runyon v. McCrary*, 427 U.S. 160, 181 (1976).

The State emphasizes Senator McCain's floor statement asking for a "level playing field" for the tribes. Petition at 16. If the State reads this phrase to mean that tribes must conduct gaming under existing state regulations without negotiations, then it would be flatly inconsistent with the IGRA and the rest of its legislative history. Petitioner has snipped a fragment from a long speech in which Senator McCain explained his concern that states might take unfair advantage of the compact requirement:

> If after a period of time the compact approach proves unfair to Indian tribes in their ability to establish and operate class III gaming activities, then the Congress may have to revisit this class III provision.
>
> . . . .
>
> If the States take advantage of this relationship, the so-called compacts, then I would be one of the first to appear before my colleagues and seek to repeal this legislation because we must ensure that the Indians are given a level playing field . . .

134 Cong.Rec. S. 12653 (daily ed., Sept. 15, 1988) (remarks of Sen. McCain).

The sponsors of the IGRA understood that tribes might end up with greater flexibility than state-licensed gaming operators:

> We should be candid about gambling. This issue is not one of crime control, morality or economic fairness. Lotteries and other forms of gambling abound in many States, charities and church organizations nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry chooses to live. *Moreover, Indian tribes may have a competitive advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage.*

S.Rep. No. 100-446, *supra*, at 36, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 3105 (additional views of Sen. Evans) (emphasis supplied).

In particular, the controlling Committee Report makes it clear that Congress meant the limits on tribal

gaming operations to be settled in negotiations between the state and the tribe, rather than automatically imposed by state law:

> licensing issues under clause vi [§2710(d)(3)-(C)(vi)] may include agreements on *days and hours of operation, wage[r] and pot limits, types of wagers, and size and capacity* of the proposed facility.

S.Rep. No. 100-446, *supra*, at 14, 1988 U.S. CODE CONG. & ADMIN. NEWS at 3084 (emphasis supplied).

The decision below correctly construed the IGRA's requirement that a state negotiate over the rules that will apply to reservation versions of the games permitted under state law. There is no reason for this Court to intervene in the dispute. The decision below may help to persuade other States to take the negotiating process seriously, but it leaves the hard and substantive legal issues to future cases.

B. There is No Question of General Importance About the Sequence in Which a Tribal Ordinance Must Be Adopted.

The Petition also asks this Court to review the contention that a Tribe must adopt a tribal gaming ordinance before it may request negotiations under the IGRA. This contention is frivolous. The IGRA expressly requires that a state negotiate in good faith upon receiving a request to negotiate from a resident tribe. 25 U.S.C. §2710(d)(3)(A). As the District Court held, "[t]he obligation to negotiate cannot be more plain or unconditioned". Appendix at 28A. The Court of Appeals similarly found that "the IGRA plainly requires a state to enter into negotiations

with a tribe upon request". Appendix at 11A. Adoption of a tribal gaming ordinance would be pointless until a tribal-state gaming compact defines the limits on tribal gaming. As the District Court observed:

> Adoption of an ordinance as a precondition to any negotiations would encourage the Tribe to adopt an ordinance authorizing all forms of Class III gaming to avoid limiting its bargaining position.

Appendix at 28A.

The narrow question of whether the IGRA imposes a technical requirement for adoption of a tribal ordinance prior to seeking negotiations has neither general importance nor substance. This Court need not address it.

III. CONCLUSION

There is no substantial question of federal law presented in this case, and no issue which has broad importance for the implementation of the Indian Gaming Regulatory Act. The petition for certiorari should be denied.

Dated: December 6, 1990

Respectfully submitted,

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(4)

No. 90-871

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

MASHANTUCKET PEQUOT TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

1. Whether the State of Connecticut, which permits certain games of chance to be played under specified conditions, is required by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to enter into negotiations with respondent Mashantucket Pequot Tribe concerning the conditions and limitations under which the Tribe may operate similar games of chance on its Reservation in Connecticut.

2. Whether a State, which is required by IGRA to negotiate about a possible Tribal-State gaming compact "upon receiving such a request" from a Tribe, 25 U.S.C. 2710(d)(3)(A), may nonetheless refuse to enter into negotiations until the Tribe adopts an ordinance authorizing the type of gaming it proposes to conduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-871

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

MASHANTUCKET PEQUOT TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This Brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court held that the State of California could not enforce its gambling laws to bar gambling activities conducted by Indian Tribes on their Reservations, where state law did not prohibit gambling in general or the particular types of gambling at issue (bingo, draw poker, and other card games). The Court held that Public Law 280 [1] did not permit application of California's laws to the Tribes' gambling because the

[1] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. 1162.

State's laws, while regulating gambling, did not prohibit the types in which the Tribes were engaged. 480 U.S. at 207-214. The Court also held that the State's laws regulating gambling were preempted under the special principles applied to state laws affecting Indians, which require a balancing of the respective federal, tribal, and state interests. 480 U.S. at 214-222 (citing *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983)).[2]

Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*, in the wake of *Cabazon*, in order to establish a system for regulating gambling activities on Indian lands. IGRA divides gaming in Indian country into three categories. Class I consists of traditional Indian gaming, which is subject to the exclusive jurisdiction of the Tribes. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, bingo-related games, and certain non-banking card games (*i.e.*, games such as poker that are played against other players, as distinguished from games such as blackjack that are played against the house). 25 U.S.C. 2703(7)(A).[3] An Indian Tribe may engage in or license Class II gaming if (A) it is "located within a State that permits such gaming for any purposes by any person, organzation or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)," and (B) "the governing body of the Indian tribe adopts an ordinance or reso-

---

[2] The Court in *Cabazon* cited with approval a district court decision holding that bingo conducted by respondent Mashantucket Pequot Tribe was exempt from regulation by the State of Connecticut because Connecticut's laws governing bingo also were regulatory rather than prohibitory in nature. See 480 U.S. at 210 n.9, 218 (citing *Mashantucket Pequot Tribe* v. *McGuigan*, 626 F. Supp. 245 (D. Conn. 1986).

[3] Certain banking card games operated on or before May 1, 1988, also are treated as Class II gaming under a special grandfather provision. 25 U.S.C. 2703(7)(C). This grandfather provision was at issue in *United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990), discussed at page 15, *infra*.

lution" that meets certain statutory standards and that has been approved by the Chairman of the National Indian Gaming Commission established by IGRA. 25 U.S.C. 2710(a)(2) and (b). The Commission must monitor Class II gaming and is authorized to enforce IGRA and tribal ordinances regulating such gaming. See 25 U.S.C. 2704-2709, 2713-2716.

All other types of gaming—including dice, non-grandfathered banking card games, and slot machines—are designated as Class III gaming under IGRA. 25 U.S.C. 2703(8). Class III gaming activities, like Class II activities, are lawful on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710 (d)(1)(B). Hence, if the State does not permit "such gaming," that is the end of the matter. However, if "such gaming" is permitted by the State, the Tribe may conduct the particular Class III gaming activity on Indian lands if two further conditions are satisfied: First, like Class II gaming, it must be authorized by an ordinance adopted by the Tribe and approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. 2710(d)(1)(A). Second, Class III gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" that "is in effect." 25 U.S.C. 2710(d)(1)(C).[4] The compact is "in effect" when notice of its approval by the Secretary of the Interior is published in the Federal Register. 25 U.S.C. 2710(d)(3)(B).

IGRA contains several provisions pertaining to the negotiation of a Tribal-State compact to govern Class III gaming activities. First, it provides that a Tribe wishing to conduct a Class III gaming activity on Indian lands over which it has jurisdiction shall request the State to negotiate for the purpose of entering into a compact. 25 U.S.C. 2710(d)(3)(A). IGRA then pro-

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[4] By contrast, a Tribe need not negotiate a compact with a State in order to engage in Class II activities.

vides that "[u]pon receiving such a request," the State "shall negotiate with the Indian tribe in good faith to enter into such a compact." *Ibid.*

Second, IGRA identifies some of the matters that are subject to negotiation between the Tribe and the State, including "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity"; "the allocation of criminal and civil jurisdiction between the State and the Indian tribe" for enforcement of such laws and regulations; state assessments to defray the cost of regulation; comparable tribal taxes; and "standards for the operation of such activity and maintenance of the gaming facility, including licensing." 25 U.S.C. 2710(d)(3)(C).

Third, Congress prescribed procedures to facilitate negotiations and to permit and regulate Class III gaming if the parties do not agree to a compact. 25 U.S.C. 2710(d)(7). Specifically, IGRA authorizes a Tribe to bring an action in federal district court if the State fails to enter into negotiations upon request or to conduct such negotiations in good faith. 25 U.S.C. 2710(d)(7)(A)(i). Such an action may not be brought until 180 days have elapsed after the Tribe made its request. 25 U.S.C. 2710(d)(7)(B)(i). If the court finds that the State has failed to negotiate with the Tribe, the court shall order the State and the Tribe to conclude such a compact within 60 days. 25 U.S.C. 2710(d)(7)(B)(iii). In determining whether the State has negotiated in good faith, the court "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." 25 U.S.C. 2710(d)(7)(B)(iii)(I).

If the State and Tribe fail to conclude a compact within this additional 60-day period, each must submit to a mediator appointed by the court "a proposed compact that represents their last best offer for a compact." The mediator then must select the proposed compact that best

comports with the terms of IGRA, other federal law, and the findings and order of the court. 25 U.S.C. 2710 (d) (7) (B) (iv). If the State consents within 60 days to the proposed compact selected by the mediator, it shall be treated as a Tribal-State compact entered into between the State and the Tribe. 25 U.S.C. 2710(d) (7) (B) (vi). If the State does not consent to the proposed compact selected by the mediator, the Secretary of the Interior, in consultation with the Tribe, shall prescribe procedures under which Class III gaming activities may be conducted on Indian lands over which the Tribe has jurisdiction. The procedures adopted by the Secretary must be consistent with the proposed compact selected by the mediator, the provisions of IGRA, and "the relevant provisions of the laws of the State." 25 U.S.C. 2710(d) (7) (B) (vii) (I).[5]

2. In March 1989, respondent Mashantucket Pequot Tribe requested the State of Connecticut to enter into negotiations for the purpose of forming a Tribal-State compact to govern Class III games of chance on its Reservation. The State, however, refused to negotiate. Pet. App. 3A, 24A. When the 180-day period passed without conclusion of a compact, the Tribe filed this action, seeking (1) an order directing the State to conclude a compact with the Tribe within 60 days, pursuant to 25 U.S.C. 2710(d) (7) (B) (iii), and appointing a mediator to resolve any resulting impasse, pursuant to 25 U.S.C. 2710(d) (7) (B) (iv); and (2) a declaratory judgment that IGRA requires the State to negotiate in good faith

[5] Section 23 of IGRA, 102 Stat. 2487, added a new criminal prohibition, 18 U.S.C. 1166, which provides that, "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian Country." This provision assimilating state law as federal law expressly excludes from the definition of "gambling" all Class I gaming, Class II gaming authorized by the National Indian Gaming Commission, and Class III gaming conducted under a compact that has been approved by the Secretary of the Interior and is in effect. 18 U.S.C. 1166(c).

regarding the conduct of Class III gaming on the Reservation. Pet. App. 4A.

The district court granted summary judgment in favor of the Tribe, Pet. App. 23A-38A, and directed the State to enter into good faith negotiations and to conclude a compact governing the conduct of games of chance within 60 days. *Id.* at 37A. The court first rejected the State's assertion that 25 U.S.C. 2710(d)(1) prescribes a sequential process, under which the State need not even enter into compact negotiations in response to a Tribe's request until the Tribe has adopted an ordinance permitting a specific type of Class III gaming and that ordinance has been approved by the Chairman of the Commission. Pet. App. 26A-29A. The court noted that 25 U.S.C. 2710(d)(3)(A) states that, "[u]pon receiving such a request," the State "shall negotiate with the Indian tribe in good faith to enter into such a compact." The court found nothing in the plain language of this provision to suggest that the existence of a tribal ordinance is a condition precedent to negotiations; the only condition, the court explained, is a "request" by the Tribe, which concededly occurred here. Pet. App. 28A.

The district court also held that, under 25 U.S.C. 2710(d)(1)(B), the scope of Class III games of chance proposed by the Tribe—including days and hours of operation and types and size of wagers—is a proper subject of negotiations, because Connecticut permits nonprofit organizations to engage in casino-type games of chance at "Las Vegas nights." Pet. App. 29A-37A. The State acknowledged that it permits "[a]ny nonprofit organization, association or corporation [to] promote and operate games of chance to raise funds for the purposes of such organization," subject to certain limitations and restrictions, such as those on the size of wagers, character of prizes, and frequency of operation. Conn. Gen. Stat. Ann. § 7-186a(b) (West 1989 & Supp. 1990).[6] But the State contended that it prohibits com-

[6] Applicable regulations state that permissible games of chance include blackjack, poker, dice, roulette, baccarat, and other common

merical gambling as a matter of criminal law and public policy, and it accordingly argued that any Class III games of chance the Tribe proposes to operate must comply with all state requirements concerning hours of operation and types and size of wagers. Pet. App. 29A-30A, 35A-36A.

The district court held that because the State permits games of chance on "Las Vegas nights," the Tribe's proposal to conduct the same types of games satisfies IGRA's condition that Class III gaming is lawful only if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). In so ruling, the court applied the regulatory/prohibitory distinction approved by this Court in *Cabazon*, 480 U.S. at 209-212, and held that the games of chance at issue here are not prohibited in Connecticut, but instead are permitted subject to extensive regulation and limitation. Pet. App. 35A-37A.[7] In the court's view, the legislative history of IGRA further refuted the State's contention that the Tribe's Class III gaming activities must comply with all conditions and limitations that state law imposes on Class III games of chance, because the Senate Report states that days and hours of operation, wage and pot limits, types of wagers, and the capacity of the facility are proper subjects of negotiation between the Tribe and the State. *Id.* at 35A (citing S. Rep. No. 446, 100th Cong., 2d Sess. 14 (1988)).

3. The court of appeals affirmed the judgment of the district court in all respects. Pet. App. 1A-22A. In addition, the court clarified that, regardless of the sincerity

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casino games. Pet. App. 35A (citing Conn. Agencies Regs. § 7-186k-15 (1987)).

[7] The court noted that in *Cabazon*, this Court rejected California's similar contention that because high-stakes, unregulated bingo was prohibited by its criminal laws, California's laws governing bingo were "prohibitory" rather than "regulatory" in nature. Pet. App. 31A-32A (citing *Cabazon*, 480 U.S. at 210-211).

of its motives, "[w]hen a state wholly fails to negotiate, as did Connecticut in the instant case, it obviously cannot meet its burden of proof to show that it negotiated in good faith." *Id.* at 22A. Finally, although the court of appeals held that Connecticut is required by IGRA to enter into negotiations with the Tribe, it expressed no view on what Class III gaming might ultimately be permitted, "necessarily leav[ing] to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation." *Id.* at 20A.

4. Both the district court and the court of appeals declined to stay the district court's judgment. Pet. 10; Pet. App. 41A-44A. Accordingly, the State and the Tribe engaged in negotiations. When no agreement was reached, each submitted a proposed compact to a mediator, pursuant to 25 U.S.C. 2710(d)(7)(B)(iv). The State chose not to propose a compact containing conditions and limitations on the Tribe's operation of games of chance similar to those imposed by state law on nonprofit groups that conduct such games at "Las Vegas nights." Instead, the State proposed to assume licensing and oversight authority, without specific limits on the size, stakes or commercial character of games of chance conducted on the Reservation. Br. in Opp. 8. On October 22, 1990, the mediator selected the compact proposed by the State. Pet. 10.

The State refused to consent, within 60 days, to the compact it had proposed. See 25 U.S.C. 2710(d)(7)(B)(iv)-(vii). As noted above (see page 5, *supra*), IGRA provides that in such circumstances, the Secretary, in consultation with the Tribe, shall prescribe procedures for the conduct of the Class III gaming that are consistent with the proposed compact selected by the mediator (here, the compact proposed by the State), the provisions of IGRA, and relevant provisions of state law. 25 U.S.C. 2710(d)(7)(B)(vii). We have been informed by the

Department of the Interior that the development of such procedures is pending before that Department.

DISCUSSION

The court of appeals correctly interpreted and applied the relevant provisions of the Indian Gaming Regulatory Act in the particular circumstances of this case, and its decision is fully in accord with the decisions of the other courts of appeals that have construed IGRA. See *United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *United Keetoowah Band of Cherokee Indians* v. *Oklahoma ex rel. Moss*, No. 87-2797 (10th Cir. Mar. 14, 1991), slip op. 14-19, 24-25. Furthermore, the court of appeals held only that the State of Connecticut was required to negotiate in good faith regarding the Tribe's proposal to enter into a Tribal-State compact permitting it to conduct certain Class III gaming on its Reservation; the court did not impose any substantive limitations on the proposals the State might make in the negotiation process. Congress intended the compact-negotiation process to facilitate the elimination of remaining areas of disagreement between States and Tribes with respect to forms of gaming other than those (principally bingo and related games) that were addressed by this Court's decision in *Cabazon*. The decision below fulfills that congressional purpose. Further review therefore is not warranted.

1. Petitioners err in asserting (Pet. i, 14) that the court of appeals has held that IGRA "compel[s]" the State of Connecticut "to stand aside and witness the arrival of casino gambling" on the Tribe's Reservation. To the contrary, the court expressly declined to address "whether and to what extent the regulatory framework under which [casino-type] games of chance are currently permitted in the State shall apply on the Reservation." Pet. App. 20A. The decision below merely requires the State to enter into negotiations on that subject. The negotiation process envisaged by IGRA contains many

provisions for the protection of the State's interests, and it in no way forecloses the possibility that Class III gaming activities might ultimately be permitted on Indian lands only if conducted in circumstances that conform closely to those in which the State permits such gaming by others.

In the first place, a Tribe might voluntarily agree to a compact that calls for compliance with many of the State's restrictions on the proposed Class III gaming. Moreover, if the Tribe and the State do not reach an agreement, the Tribe is entitled to judicial relief under IGRA only if the State has failed to negotiate in good faith. If the State *has* negotiated in good faith, IGRA affords the Tribe no further protection.[8]

Even if the court finds that the State did not engage in good faith negotiations in response to the Tribe's initial request, it must give the State another, 60-day opportunity to reach agreement with the Tribe. If the parties again do not reach agreement—and if the Tribe and State then submit proposed compacts to a mediator—the mediator might select the State's proposal as the one "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." 25 U.S.C. 2710(d)(7)(B)(iv). In this very case, for example, the mediator selected the compact proposed by the State, which gives the State licensing and oversight authority. Finally, if the State declines to consent to the compact selected by the mediator, the procedures prescribed by the Secretary for the conduct of Class III gaming within the Tribe's jurisdiction must be consistent not only with the compact se-

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[8] IGRA expressly provides that in determining whether a State is negotiating in good faith, a district court may "take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." 25 U.S.C. 2710(d)(7)(B)(iii)(I). As a result, the extent to which a State permits gambling is a relevant factor in judging whether a State that seeks narrow limits on Indian gaming is negotiating in good faith.

lected by the mediator and the provisions of IGRA, but also with "the relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii)(I). Thus, petitioners' pervasive assertion that the court of appeals' construction of IGRA entirely overrides the State's laws and public policies is without merit.

2. Petitioners contend (Pet. 12-17) that the State of Connecticut is entitled under IGRA to subject all Class III gaming by Indian Tribes in the State to the same conditions and limitations under which such gaming is permitted by others under state law. If petitioners were correct, the compact-negotiation process fashioned by Congress would be rendered meaningless, because there would be nothing for the State and the Tribe to negotiate *about*. The court of appeals, however, properly rejected petitioners' broad submission, holding that IGRA does not entitle the State of Connecticut to refuse to enter into any negotiations over whether, and to what extent, the rules governing proposed Class III gaming conducted by the Tribe may differ from those the State imposes on the same gaming that is conducted by nonprofit groups on "Las Vegas nights."

a. Petitioners' position that the State's substantive laws apply of their own force, and hence are not subject to negotiation under IGRA, conflicts with IGRA's express provision that it is the negotiated compact—not state law—that "govern[s] the conduct of gaming activities." 25 U.S.C. 2710(d)(3)(A). To this end, Congress provided in 25 U.S.C. 2710(d)(3)(C)(i) that the extent to which state (or tribal) criminal and civil laws are to be applied to Class III gaming activities on Indian lands is subject to negotiation between the Tribe and the State. Petitioners' position is also undercut by 25 U.S.C. 2710(d)(5), which provides (emphasis added):

> Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with,

> or less stringent than, *the State laws and regulations made applicable by any Tribal-State compact* entered into by the Indian tribe under paragraph (3) that is in effect.

This provision confirms that although state law has an important role to play in the regulation of Class III gaming, IGRA does not require that every Class III gaming activity on Indian lands must conform to *all* state laws governing that particular activity.

b. Petitioners' contention that the State may turn its back on a negotiation request—and unilaterally impose on tribal games of chance the wager, pot, and operating restrictions it places on charitable "Las Vegas nights"—also is directly refuted by the Senate Report on IGRA, which states (S. Rep. No. 446, *supra*, at 14 (emphasis added)):

> The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. [25 U.S.C. 2710(d)(3)(C)] describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. * * * For example, *licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility.*

Congress thus clearly intended that a State would be required at least to negotiate about such subjects, even where state law already addresses them.[9]

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[9] The Senate Report also explains (at 14) that "States are not required to forgo any governmental rights to * * * regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact." This statement reflects again the congressional intent that the extent to which state law will apply depends upon the negotiations. It does not support the State's position that it may altogether ignore the negotiation process and unilaterally impose state law.

Under petitioners' view, by contrast, a State that wanted to accommodate tribal interests would be barred by *federal* law (IGRA) from entering into any compact that departed even slightly from the conditions under which that State permits the same Class III gaming activity to be conducted by non-Indians. IGRA should not be given such a self-defeating construction.

c. The correctness of the court of appeals' interpretation and application of IGRA is further reinforced by the fact that IGRA codifies both the specific holding in *Cabazon* and the regulatory/prohibitory distinction applied by the Court in *Cabazon* for determining when gaming may be conducted by an Indian Tribe. Specifically, IGRA permits a Tribe to conduct bingo and other Class II gaming if it is in a State "that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. 2710(b)(1)(A). The Senate Report states with respect to this condition (S. Rep. No. 446, *supra*, at 6):

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.[10]

IGRA extends the same approach to Class III gaming by subjecting the allowance of such gaming to precisely the same condition (drawn from *Cabazon*) that is appli-

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[10] The congressional intent to codify *Cabazon* is further reflected in the statutory findings, which state, *inter alia*, that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. 2701(5); see Pet. App. 13A.

cable to Class II gaming—namely, that it be "located within a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710 (d)(1)(B). However, unlike Class II gaming, which is automatically permitted by IGRA where this condition is satisfied (and where the authorizing tribal ordinance is approved by the Chairman of the Commission), Class III gaming must, in addition, be conducted pursuant to a compact negotiated between the Tribe and the State.

Petitioners contend (Pet. 12) that Connecticut was not required to engage in such negotiations concerning Class III gaming because the requirement that "such gaming" be permitted by state law is not satisfied here. However, petitioners concede (Pet. 9 & n.1) that Connecticut "does permit various forms of legalized gambling," including a state-operated lottery game, off-track betting, and pari-mutuel wagering on jai alai and greyhound racing. And petitioners further concede (Pet. 13) that "[u]nquestionably, casino type games are conducted under a Las Vegas night permit (i.e., poker, blackjack, roulette, etc.)." See Pet. App. 7A n.5. This case therefore closely resembles *Cabazon*. There, although California did not permit "high stakes, *unregulated* bingo," the Court concluded that because "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery," California "regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211.

Similarly here, although Connecticut does not permit high stakes, unregulated games of chance that fall within Class III under IGRA, Connecticut "permits a substantial amount of gambling activity, including [Class III games of chance permitted at Las Vegas nights], and actually promotes gambling through its state lottery." Connecticut therefore "regulates rather than prohibits gambling in particular and [the Class III games of chance permitted at Las Vegas nights] in particular." Put another way (in the terms of the condition IGRA

imposes on Class III gaming): insofar as the Tribe seeks to conduct games of chance that Connecticut permits at Las Vegas nights, the Tribe's gaming will be "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B).

As the court of appeals pointed out, Pet. App. 14A, the Eighth Circuit reached the same conclusion in construing the identical condition applicable to Class II gaming under 25 U.S.C. 2710(d)(1)(A), observing that "the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (1990).[11] Accord, *United Keetowah Band of Cherokee Indians* v. *Oklahoma ex rel. Moss*, No. 87-2797 (10th Cir. Mar. 14, 1991), slip op. 24-25 (quoting same passage from *Sisseton-Wahpeton*). Thus, the court of appeals' determination that Connecticut regulates rather than prohibits certain Class III games of chance, and that therefore "such gaming" is permitted in the State, is consistent with other cases arising under IGRA. Further review on this issue is not warranted.[12]

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[11] The Eighth Circuit therefore held that the pertinent laws of South Dakota were regulatory rather than prohibitory in nature, even though the State allowed only "low stakes" blackjack, and that the Tribe could conduct high-stakes blackjack games under the grandfather provision for Class II gaming. See note 3, *supra*.

[12] Petitioners acknowledge that there is no conflict among the circuits on this question, but they assert (Pet. 14-15 & n.4) that this case is deserving of review because several cases are pending in the lower courts that concern the relationship between IGRA and state gambling laws. Only one of those cases is currently pending on appeal, and the issue it presents—whether the lottery games proposed by the Tribe are Class II or Class III gaming—is entirely distinct from the issue presented by this case. See *Oneida Tribe of Indians* v. *State of Wisconsin*, 742 F. Supp. 1033 (W.D. Wis. 1990),

3. Finally, petitioners contend (Pet. 17-18) that a State has no duty to negotiate with a Tribe about a possible Tribal-State compact unless the Tribe has first adopted, and the Chairman of the Commission has first approved, an ordinance authorizing the particular types of Class III gaming the Tribe proposes to conduct. The courts below correctly rejected this contention. Pet. App. 10A-12A, 26A-29A.

IGRA does not impose the condition precedent that petitioners urge. Under the plain language of the second sentence of 25 U.S.C. 2710(d)(3)(A), the State "shall negotiate" with the Tribe "[u]pon receiving such a request" for compact negotiations.[13] Thus, a request to ne-

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appeal pending, No. 90-3337 (7th Cir.). In *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Wisconsin*, 743 F. Supp. 645 (W.D. Wis. 1990), also cited by petitioners (Pet. 15 n.4), the court held only that under IGRA, federal criminal law (which assimilates state law through 18 U.S.C. 1166), rather than state criminal law, prohibits Indian gaming that is not authorized by IGRA itself, although the court held on equitable grounds that the Tribe was not entitled to an injunction barring state enforcement of its criminal laws. We understand that negotiations concerning Class III gaming have now begun between the Tribe and State in that case.

The Second Circuit recently held that certain gambling laws of New York law are criminal and prohibitory in nature, rather than civil and regulatory. *United States* v. *Cook*, 922 F.2d 1026, 1034-1036 (1991), petition for cert. pending, No. 90-1386. That case was a criminal prosecution under the Organized Crime Control Act of 1970, 18 U.S.C. 1955, and 15 U.S.C. 1175, which prohibits possession of certain gambling devices on Indian lands. The defendants contended that New York law is regulatory rather than prohibitory with respect to slot machines, and that 18 U.S.C. 1955 should not be construed to apply where state law is regulatory (an issue this Court left open in *Cabazon*, 480 U.S. at 214). The Second Circuit did not resolve the latter question, because it concluded that New York law was prohibitory as to the defendants' possession of slot machines. In contrast to Connecticut's regulation of the games of chance at issue here, New York flatly *prohibits* slot machines. 922 F.2d at 1035-1036. Moreover, this case arises under IGRA, not 18 U.S.C. 1955 or 15 U.S.C. 1175.

[13] The first sentence of 25 U.S.C. 2710(d)(3)(A) states that "[a]ny Indian tribe having jurisdiction over the Indian lands upon

gotiate is the only condition precedent specified by the relevant Section of IGRA.

To be sure, 25 U.S.C. 2710(d)(1), upon which petitioners rely (Pet. 17), provides that Class III gaming is not lawful until all of the conditions it lists are satisfied. Those conditions are (A) that a tribal ordinance authorizing such gaming has been adopted by the governing body of the Tribe and been approved by the Chairman of the Commission, (B) that the gaming is located in a State that permits such gaming, and (C) that the gaming is conducted in conformance with a Tribal-State compact that has been approved by the Secretary and is in effect. 25 U.S.C. 2710(d)(1)(A), (B) and (C). But contrary to petitioners' contention, nothing in these conditions suggests that they must be satisfied in the sequence in which they are listed—*i.e.*, that the Tribe must adopt (and the Commission Chairman must approve) an authorizing tribal ordinance before the Tribe and the State may agree to a compact and the Secretary may approve that compact.

As the court of appeals pointed out, petitioners' argument that the conditions in 25 U.S.C. 2710(d)(1) must be satisfied sequentially is undercut by the fact that what would seem to be a threshold requirement—that the gaming would be in a State that permits "such gaming"—is listed *second*. See Pet. App. 12A. Petitioners' position is also inconsistent with 25 U.S.C. 2710(d)(2)(C), which provides that "[e]ffective with the publication * * * of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman * * *, class III gaming activity on the Indian lands shall be fully subject to the terms and con-

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which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." This sentence likewise does not condition the ability of a Tribe to request a State to enter compact negotiations upon the existence of an enacted and approved tribal ordinance.

ditions of the Tribal-State compact entered into * * * by the Indian tribe *that is in effect*" (emphasis added). As the court of appeals pointed out, this provision appears to assume that consummation of the compact will *precede* adoption and approval of the implementing tribal ordinance, Pet. App. 11A—just as approval of a treaty or interstate compact will usually precede enactment of implementing legislation by Congress or state legislatures.

Moreover, nothing in the listing in 25 U.S.C. 2710(d)(1) of the conditions that must *ultimately* be satisfied in order for the Tribe to conduct Class III gaming in a lawful manner overrides the requirement in 25 U.S.C. 2710(d)(3)(A) that the State at least commence negotiations about a possible compact "[u]pon receiving" a request by the Tribe. And with good reason. It would make little sense to require a Tribe to adopt a gambling ordinance unless and until it knows the types of Class III gaming activities to which the State would agree and the circumstances under which the compact will allow those activities to be conducted. It makes even less sense for the Chairman of the National Indian Gaming Commission to give his formal approval of such an ordinance at a time when there is, as yet, no assurance that the State and Tribe will agree to a compact that would render those activities lawful.

Petitioners contend (Pet. 18) that under the court of appeals' construction, "States may be faced with the prospect that a Tribe, without first examining the issue of permitting gambling upon its tribal lands via the ordinance adoption vehicle, may demand and secure negotiations of the State." This policy argument, however, cannot overcome the plain language of 25 U.S.C. 2710(d)(3)(A), which contemplates that tribal representatives may first negotiate with the State about the nature and scope of Class III activities to be permitted, and then present the negotiated agreement to the governing body of Tribe so that it may enact an ordinance authorizing those activities and providing for any tribal regulation

called for under the compact. Nor does this policy argument have force as a practical matter, since there is no reason to suppose that a Tribe would direct its representatives to engage in negotiations with the State if the Tribe were not at least tentatively committed to conducting gaming activities.[14]

In any event, the question whether a Tribe must first adopt an ordinance and then negotiate a Class III gaming compact with a State—or may instead proceed in the reverse order—is not an issue of sufficient importance to warrant review by this Court, particularly in the absence of a conflicting holding by any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

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[14] Petitioners' position also would effectively require the Tribe to make a public disclosure of its negotiating position, while leaving the State free to keep its negotiating position confidential. IGRA should not be construed to require this sort of imbalance in the negotiating process.

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No. 90-871

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT AND
GOVERNOR WILLIAM A. O'NEILL,

Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATES OF ARIZONA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, NORTH DAKOTA AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE STATE OF CONNECTICUT

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INTEREST OF THE AMICI CURIAE

The interest of the Amici Curiae States in support of the grant of the petition for certiorari herein lies in their mutual desire to have the provisions of the Indian Gaming Regulatory Act of 1988 ("IGRA"), Pub. L. 100-497, 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168, clearly defined. In view of the mandate in the law compelling the various States of the Union to negotiate with requesting Indian Tribes over the scope and reach of certain gambling activities within Indian country, the issues presented by the petition for certiorari are important not only to the State of Connecticut, but to each of the Amici Curiae States.

Moreover, as it appears that this case is the first one to reach this Court following the enactment in 1988 of IGRA, it presents issues of first impression, the resolution of which will provide useful guidance to all States of the Union, as well as to affected Indian tribes, and not merely to the Amici Curiae States herein.

Accordingly, the Amici Curiae States support the State of Connecticut in its petition for a writ of certiorari and urge that the same be granted by this Court.

ARGUMENT

THE PETITION FOR CERTIORARI RAISES SIGNIFICANT AND IMPORTANT NATIONAL ISSUES OF LAW REGARDING THE PROPER INTERPRETATION OF IGRA

The Indian Gaming Regulatory Act of 1988 ("IGRA"), Pub. L. 100-497, 25 U.S.C. §§ 2701-2721 and 18 U.S.C.

§§ 1166-1168, seeks to establish a nationwide framework for the authorization, regulation and control of gambling in Indian country – and, under certain circumstances, in "noncontiguous" areas – within the various States of the Union. Indeed, the Senate Report accompanying IGRA[1] stated that, as of the date of the report (August 3, 1988), there were only five states – Arkansas, Hawaii, Indiana, Mississippi and Utah – " . . . that criminally prohibit any type of gaming, including bingo." *See* Sen. Rep. 100-446 at 11; 1988 U.S. Code Cong. & Admin. News 3071, 3081. Thus, it is clear that the issues presented by the petition for certiorari have nationwide application and impact and are not confined merely to the State of Connecticut.

The central significance of the issues presented in the petition for certiorari lies in the resolution of the question whether under IGRA, a State which allows strictly limited, charitable non-commercial gaming activities may properly be compelled to negotiate with a requesting Indian tribe for commercial tribal gambling operations which utilize the format of such state charitable games, but without the state restrictions. Stated otherwise, did Congress intend through the enactment of IGRA to lay the foundation for commercial casino gambling in States which permit charitable "Las Vegas Nights" or "Monte Carlo Nights", but otherwise criminally prohibit casino gambling operations such as those found in Nevada and New Jersey? It is the position of the Amici Curiae States that not only is that a result which Congress never

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[1] *See* Sen. Rep. No. 100-446; 1988 U.S. Code Cong. & Admin. News 3071.

intended, it is one which Congress specifically sought to avoid.

In its petition for certiorari, Connecticut sets forth a list of seven pieces of litigation pending in six different states from across the Union.[2] Each of the cases involves one or more of the issues addressed in the petition and/or the opinion of the Court of Appeals herein. The petition also properly notes that the present case will not be the last, since IGRA has not heretofore been reviewed by this Court.

It is for this reason alone, therefore, that the petition should be granted, for it involves important questions of federal law which have not been, but should be, settled by this Court within the purview of Rule 10.1(c), Rules of the United States Supreme Court.

From an intellectual perspective, it is difficult to reconcile the lower court's opinion with the legitimate right of the States to expect that, through the balanced operation of IGRA, the " . . . interests of *both* sovereign [State and Tribal] entities are met with respect to the regulation of complex gaming enterprises. . . . " (emphasis added).[3] If a State, through its freely-elected representatives and officials, determines that a particular type or scope of gaming activity is to be lawfully allowed, but that

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[2] *See* Connecticut Petition for Certiorari, pp. 14-15, n. 4. The suits involve the States of California, Michigan, Minnesota, Mississippi, New York and Wisconsin.

[3] *See* Sen. Rep. No. 100-446 at 13; 1988 U.S. Code Cong. & Admin. News 3071, 3083.

another type or scope of gaming activity is to be criminally prohibited as unlawful, such determinations should be accorded due deference.

In this respect, however, the lower court's opinion falls short, despite the admonition of Senate Report 100-446 that IGRA contemplates recognition of the State's legitimate law enforcement and public policy concerns. It is of substantially more than passing concern to the States that, under the purported authority of the IGRA "compacts" and the "civil/regulatory-criminal/prohibitory" dichotomy,[4] they may be divested of the power to determine what are and what are not their legitimate public policy concerns regarding gambling operations which will affect and impact their residents.

In this regard, moreover, it would be naive to suggest that the State of Connecticut, following the ruling of the District Court herein, could have successfully negotiated a compact which, for example, limited the tribal gambling operation in question to a purely non-commercial enterprise. It would be equally naive to suggest, as a further example, that Connecticut could have successfully negotiated a compact which forbade the payment of cash to casino game winners. Gamblers, and in particular non-Indian, non-tribal member individuals, do not patronize casinos with the objective of winning merchandise prizes.

And yet, without regard to the subsequent submission of "last best offer" compacts to the mediator herein

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[4] The dichotomy was first fashioned in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-211 (1987).

pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), the District Court opinion specifically held, and the Court of Appeals affirmed, that, under this Court's pre-IGRA decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the "civil-regulatory/criminal-prohibitory" dichotomy mandated a conclusion that the low-stakes, charitable games legalized by Connecticut constituted "such gaming" as proposed by the tribe under 25 U.S.C. § 2710(d)(1)(B).

Under this rationale, if a State permits a charitable, non-commercial organization such as a church to conduct a strictly regulated "Casino Night", with scrip wagers and merchandise only prizes, the District Court and Court of Appeals opinions mandate that State to negotiate with a requesting tribe for a commercial casino. To force a State, for example, to consider repealing all of its laws permitting charities to conduct such activities as the only alternative to preventing the incursion of commercial casinos would be an unfortunate and unnecessary consequence of the lower court opinion.

Such a result is not one intended by Congress, whether one examines the specific language of IGRA, Senate Report 100-446, the extensive floor debates[5] or the

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[5] *See, e.g.*, 134 Cong. Rec. S12643-S12663 (daily ed. Sept. 15, 1988); 134 Cong. Rec. H8146-H8157 (daily ed. Sept. 26, 1988).

transcripts of the congressional hearings.[6] With regard to the "such gaming" verbiage in 25 U.S.C. § 2710(d)(1)(B), the Court of Appeals opinion herein erroneously interprets the ruling in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) in concluding that Connecticut "Las Vegas Nights" were intended by Congress to have the effect of compelling the States to negotiate with requesting Indian tribes for commercial casino operations.

As heretofore stated, the position of the Amici Curiae States is that such was not the intent of Congress in enacting IGRA. However, if, in fact, such a result was an objective of Congress, this Court should make that clear.

CONCLUSION

Accordingly, for the foregoing reasons, the Amici Curiae States respectfully submit that the Petition for Certiorari should be granted, that briefing on the merits should be ordered and that the matter should be thereafter set for argument to the Court.

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[6] *See, e.g.*, "Gaming Activities on Indian Reservations and Lands: Hearing Before the Select Committee on Indian Affairs on S. 555 and S. 1303," June 17, 1987, 100th Cong., 1st Sess. (S. Hrg. 100-341) at 92-93 (colloquy between Sen. Daniel Inouye and a representative of the U.S. Department of Justice on "casino nights" as not contemplating "casinos" under S.555, which ultimately became IGRA).

Respectfully submitted this 21st day of December, 1990.

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(5)

No. 90-871

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT, ET AL.
Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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STATEMENT

The United States has submitted a brief (hereinafter, U.S. Brief) at the invitation of this Court, expressing its view that this Court should not grant Connecticut's Petition for Writ of Certiorari. This brief is submitted in reply thereto as a Supplemental Brief pursuant to U.S. Supreme Court Rule 15.7.

I. CONTRARY TO THE SOLICITOR GENERAL'S POSITION, THE INDIAN GAMING REGULATORY ACT (IGRA) DOES NOT REQUIRE A STATE TO NEGOTIATE OVER THE INTRODUCTION OF GAMING THAT STATE LAW PROHIBITS.

The essence of the Solicitor General's argument is that under the State's interpretation of the Indian Gaming Regulatory Act, all "the State's substantive laws apply of their own force," U.S. Brief at 11, and the State would therefore never have to negotiate over the applicability of state law to any proposed Class III gaming. This interpretation, the Solicitor General alleges, would render the statutory negotiating process "meaningless, because there would be nothing for the State and the Tribe to negotiate *about*." *Id.* (Emphasis in the original.)

The Solicitor General's argument misconstrues the statute, the State's position in this case, and the State's good faith in negotiating and litigating all relevant gaming issues under the statute.

A. The Act Does Not Require That The Threshold Issue Of The Legality Of The Proposed Form Of Gaming Be Resolved Through The Compact Negotiation Process.

Contrary to the Solicitor General's allegation, Connecticut has never insisted that all of its substantive laws "apply of their own force" and are therefore non-negotiable. Under the compact between the Tribe and Connecticut, a number of provisions of the State's criminal law and regulatory powers

are to be applied. Indeed, the only issue of state law that Connecticut sought to resolve prior to negotiating was the threshold question whether the type of gaming requested by the Tribe was prohibited by state law and therefore not permissible in the first place under the Act.[1] The permissibility of commercial casino gaming in Connecticut is a purely legal question that is not susceptible to resolution through negotiation.

On the other hand, the Solicitor General urges a construction of IGRA that requires this fundamental, threshold legal issue to be settled through negotiation. U.S. Brief, p. 11. This interpretation cannot be readily squared with the statutory language, which states that Class III gaming activities are lawful on Indian land only if the State permits "such gaming", 25 U.S.C. § 2710(d)(1)(B), and then only if the particular gaming is authorized by a Tribal ordinance, 25 U.S.C. § 2710(d)(1)(A), and is conducted pursuant to a negotiated Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C). *See* U.S. Brief, p. 11.

The Solicitor General's construction turns the statute on its head, requiring the State to negotiate the compact before resolving the threshold question whether the gaming requested by the Tribe would be lawful and permitted in the first place under the Act. This conflicts with the Solicitor General's description of the operation of IGRA, U.S. Brief, p. 3 ("if the State does not permit 'such gaming', that is the end of the matter"), and makes little sense. By requiring that the threshold legal issue be the subject of negotiation, the Solicitor General would have the statutory question of whether the requested gaming is lawful turn not on the proper interpretation of State law but on the vagaries of the negotiation process.[2]

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[1] As the lower courts recognized, Connecticut readily admitted that other forms of Class III gaming (e.g., lottery, off-track betting, etc.) were negotiable under IGRA, since State law permitted "such gaming". *See* Pet. App., 8A, 24A.

[2] The language of 25 U.S.C. § 2710(d)(5) quoted by the Solicitor General does not support his position. That section states that Indian tribes may

(continued)

Connecticut maintains that, while IGRA is designed to permit Tribes to engage in gaming activity in a State where such activity is permitted, 25 U.S.C. § 2710(d)(1), it does not assign the resolution of this threshold issue to the negotiating process. Connecticut is entitled under IGRA to litigate the legal issue of the permissibility of casino gaming under State law, rather than being required to resolve it through negotiation.[3]

This is not to say, as the Solicitor General posits, that Connecticut believes that ". . . the State may turn its back on a negotiation request . . ." presented by a tribe pursuant to IGRA. U.S. Brief, p. 12. Connecticut has never espoused such a position. Both the District Court and the Court of Appeals acknowledged the State's flexibility[4] in this regard and noted that Connecticut had not acted in bad faith. Pet. App., 7A-8A, 22A, 24A, 42A. The State candidly responded to the Tribe's request by indicating that the permissibility of casino gambling, while not negotiable, was litigable.

The Solicitor General seems to suggest that, instead of litigating the permissibility of commercial casino gaming, the State could have largely achieved its goal by insisting upon

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[2](continued)

regulate Class III gaming on their lands "except to the extent that such regulation is inconsistent with, or less stringent than, *the State laws and regulations made applicable by any Tribal-State compact* entered into by the Indian tribe . . ." *See* U.S. Brief, pp. 11-12 (emphasis supplied by U.S. Brief). This language suggests only that certain State laws and regulations may be part of a compact. It does not suggest that the threshold issue of whether the gaming requested by the Tribe is permitted under State law, and therefore is lawful under IGRA, must be resolved through compact negotiations..

[3] Connecticut does not assert, however, that a State is free to simply fabricate a phantom issue of permissibility, for IGRA provides that a State is held to the rigid standard of good faith. *See* discussion, *infra* at p. 6-8.

[4] Connecticut timely responded to the Tribe's request, acknowledged the negotiability of other forms of gaming which are legal in the State and offered to litigate the issue of whether commercial casino gaming is permissible under State law before IGRA jurisdiction has matured. Pet. App., 8A, 24A.

draconian limitations on casino gaming in its negotiations with the Tribe. The implication is that the State should have insisted upon these limitations if it were serious about its concern over the unwanted arrival of casino gaming. U.S. Brief, pp. 8, 12.

In the first place, the District Court ordered the State to enter negotiations (Pet. App., p. 37A) while the litigation was still pending. Thus, Connecticut was compelled into a negotiating process which was distorted by the fact that the threshold legal issue of permissibility of casino gaming remained unresolved. At the same time, the State had a continuing duty to protect the health, safety and welfare of its citizens. In an attempt to balance these competing interests, Connecticut determined that it would continue to litigate the permissibility of casino gaming, while negotiating to secure the Tribe's agreement to a pervasive regulatory presence by the State if casino gaming was to occur on the reservation.[5] This was a responsible and understandable approach – more reasonable than the Solicitor General's apparent position that the State, in essence, should have stonewalled the Tribe in negotiations rather than litigate the permissibility of commercial casino gaming prior to entering negotiations.

We submit that the lower courts were incorrect that Connecticut, under the terms of IGRA, had only one choice when presented with the Tribe's request – to negotiate the permissibility of casino gaming. This Court should grant the Petition to address this issue.

B. The *Cabazon* Rationale Has Been Wrongfully Applied.

The Solicitor General wrongly asserts that the legality of Class II and Class III gaming under IGRA is identical.

[5] Had the State submitted a compact which placed severe limitations upon the size and scope of the casino operations, in essence, relitigating the threshold issue in the negotiations, the Tribe undoubtedly would not have agreed to State regulatory and criminal jurisdiction on the reservation. The Tribe would have submitted a very different, more limited compact (continued)

See U.S. Brief, p. 3. IGRA provides that ". . . [a]n Indian tribe *may engage* in . . . Class II gaming on Indian lands . . . if . . . "the conditions of permissibility under state law and ordinance adoption are satisfied. 25 U.S.C. § 2710(b)(1) (emphasis added). Indeed, the Solicitor General acknowledges that there is an "automatically permitted" quality to Class II gaming. U.S. Brief, P. 14. There is no such automatic permission for Class III gaming. The Act provides that "Class III gaming activities *shall be lawful* on Indian lands *only if* . . ." the three conditions of ordinance adoption, permissibility and Compact conformity are satisfied. 25 U.S.C. § 2710(d)(1) (emphasis added). The Solicitor General's brief makes it appear that the "only if" language appears in IGRA with reference to both Class II and Class III gaming, U.S. Brief, p. 3, but it does not. The State refers to this difference in prefatory language in its Petition, alleging that the lower courts' analysis was deserving of review since it excluded "other pertinent statutory language which demands consideration." Pet., p. 15.

The Solicitor General concludes that IGRA codifies this Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). U.S. Brief, p. 13. *Cabazon* addressed whether P.L. 280,[6] which was designed to permit a State to impose its criminal laws upon an otherwise sacrosanct Indian reservation, could be used to prevent high-stakes bingo by the Tribe. The Senate Report, relied upon by the

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[5] (continued)

leaving the State exposed to the risk that the mediator would choose the Tribe's compact and thereby preclude the State even from exercising regulatory authority over the proposed casino. State officials could not afford to run that risk.

[6] 18 U.S.C. § 1162, 28 U.S.C. § 1360.

Government in its brief, clearly directs that the *Cabazon* prohibitory/regulatory distinction be employed in deciding if "class II games are allowed in certain States." U.S. Brief, p. 13.[7]

Clearly then, Congress adopted the *Cabazon* test in IGRA, but only to determine if a Class II activity is permitted.[8] Regarding Class III, the Act stands alone with its language and arrangement as the guide. Congress intended that the *Cabazon* test was not to be used in a situation which could result in the imposition of State criminal laws upon a reservation, which, of course, can be the result of a Tribal-State compact under IGRA.

This is not a P.L. 280 case. This is an IGRA Class III gaming case. Therefore, the interpretation of "such gaming" in Class II cases such as *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (1990), and *United Keetowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, No. 87-2797 (10th Cir. Mar. 14, 1991), relied upon by the Government, is not instructive.

C. The State's Good Faith Must Be Considered.

The Solicitor General asserts that "the Tribe is entitled to judicial relief under IGRA only if the State has failed to negotiate in good

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[7] Even if the *Cabazon* test applied, the fact that Connecticut permits certain types of gaming would not make the State's absolute prohibition of commercial casino gaming "regulatory" in nature under *Cabazon*. *See* Pet., pp. 15-16.

[8] "The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games." S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988).

faith, IGRA affords the Tribe no further protection." U.S. Brief, p. 10 (emphasis supplied in original). The implication is clear. Connecticut acted in bad faith by not engaging in negotiations, despite its reasonable conviction that commercial casino gaming is not "such gaming" permitted under state law. Had it advanced this position in negotiations, rather than in litigation, the State could have deprived the Tribe of the opportunity to show bad faith and thus challenge the State's actions in court.

The Solicitor General's position demonstrates that the question of whether Connecticut acted in good faith is inextricably interwoven with the issue of what constitutes "such gaming" under the Act.[9] The Court of Appeals determined that the issue of good faith need not be considered since the State had refused to negotiate over casino gaming (Pet. App. 21A-22A). However, such a view gives no consideration to the plain meaning of the surrounding statutory language. 25 U.S.C. § 2710(d)(7)(B)(ii) clearly provides that the court must consider if a State . . . "did not respond to such a request [to negotiate] in good faith, . . ." Subsection (iii) goes on to provide that "[i]f, . . ., the court finds that the State has failed to negotiate in good faith . . ." it may then order 60-day negotiations and, failing that, may appoint a mediator. The District Court made no such finding. Pet. App. 23A to 44A. On the contrary, it held that the position and arguments of the State "are far from frivolous and present a question deserving of appellate consideration . . . ." Pet. App. 42A. Nonetheless, the District Court issued a mandatory sixty day order. Pet. App., 37A.

Failure to find a lack of good faith on the part of the State, we submit, was error on the part of the District Court which should be reviewed by this Court. "At its option . . . the Court

[9] While Connecticut has not specifically listed the State's good faith as an issue to be considered by this Court, the parties may enlarge upon the questions presented as long as the enlargement may be deemed fairly included or comprised within the stated question. Cf. U.S. Supreme Court Rule 24.1(a). *See also, Lake Country Estates, Inc. v. Tahoe Regional Planning*, 440 U.S. 391, 398 (1979).

may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." U.S. Supreme Court Rule 24.1(a).

With reference to the good faith of a State the proper standard to be applied is whether the law at issue "was clearly established at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The provisions of IGRA relating to Class III gaming, and a State's responsibility thereunder, were anything but clear when the State expressed its view that commercial casino gaming was not a proper subject of negotiation, a position "far from frivolous . . . and deserving of appellate consideration."

Since the Solicitor General has expressed his viewpoint on the issue of the good faith of Connecticut, this Court should decide if IGRA required the District Court to find that Connecticut acted in the absence of good faith before issuing a compulsory order to negotiate.

II. THE REQUIREMENT THAT A TRIBAL ORDINANCE BE ADOPTED PRIOR TO NEGOTIATIONS IS DESIGNED TO PROTECT THE SOVEREIGNTY OF THE TRIBE AND THE STATE.

IGRA 25 U.S.C. § 2710(d)(1) provides that before Class III gaming may occur upon a reservation three conditions (listed in order of appearance in the statute) must be satisfied: (1) adoption of a Tribal Ordinance; (2) location in a State which permits such gaming; and (3) conformity with a Tribal-State compact.

The Solicitor General and the lower courts find nothing in the statute which demands *sequential satisfaction* of these conditions and the government asserts it would make "little

sense" to interpret the ordinance provision as preconditional. U.S. Brief, p. 18. But the wording of the statute itself demands this interpretation. The conditions not only are listed in sequence, but in a different sequence than those governing Class II gaming. Congress specifically placed the requirement of a tribal ordinance ahead of the provisions concerning compact negotiations.

This interpretation also comports with Congress' concern about Tribal sovereignty and with common sense. It is up to the Tribe as a sovereign entity to make the determination that it wants to introduce an activity on its reservation which is fraught with inherent dangers[10] before entering a statutory process that can result in a surrender of a portion of Tribal sovereignty[11] In this manner, the resources of both the Tribe and the State need not be expended in a process which might prove needless and wasted if the Tribe later decides that it does not want casino gaming upon its reservation.[12]

By allowing the lower court ruling in this case to stand, this Court would send the message that any request for gaming by a tribal leader triggers the entire IGRA negotiating process – an interpretation that is potentially wasteful and unreasonable.

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[10] "The purpose of this Act [IGRA] is . . . (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences. . . . ." 25 U.S.C. § 2702(2).

[11] Indeed the Compact presently pending before the Secretary of the Interior permits the imposition of Connecticut criminal law upon the reservation.

[12] Contrary to the Solicitor General's assertion, there is nothing to suggest that the "Tribe" (as opposed to some leaders) has directed that negotiations take place or "tentatively committed" to casino gambling on its reservation. U.S. Brief, p. __. To our knowledge, the enabling ordinance required by 25 U.S.C. § 2710(d)(2)(C) has not yet been either adopted or submitted for approval.

CONCLUSION

These issues raised in the Solicitor General's brief are of continuing significance to Connecticut and other States and should be decided by this Court. For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a Writ of Certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

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